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In The Supreme Court of the United States

COLEMAN JACKSON; THOMAS A. CLEVELAND; LARRY CUMMINGS, JR.; STEVEN CRAIG STERLING; FRANKLYN FRANCIS; KENNETH A. WALLACE; NAJIY-ULLAH AZIYZ,

Petitioners,

v.

WALTER S. RAY, JR.; BOBBY K. WHITWORTH; JIM WETHERINGTON; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; MILTON E. NIX, JR.; MICHAEL LIGHT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MCNEILL STOKES
1040 Peachtree Battle Avenue
Atlanta, Georgia 30327
Telephone: (404) 352-2144
Facsimile: (404) 367-0353

Attorney for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

1. Does Ex Post Facto prohibit members of the Georgia parole agency from enforcing an unpublished ninety percent to serve policy foreclosing Petitioners and similarly situated inmates of any meaningful consideration for release on parole before serving de facto ninety percent of their sentences and retroactively substantially increasing their sentences to serve beyond their likely release on parole in accordance with the enacted parole laws in effect at the time of commission of their offenses after serving one-third of their judicial sentences and the months to serve calculated under statutorily mandated parole decision guidelines?

2. Does the retroactive application of an unpublished ninety percent to serve policy by the Georgia parole agency that substantially extends sentences to serve beyond the enacted parole laws and parole decision guidelines without fair legal warning also violate Due Process?

3. Should strained procedural bars be erected to avoid deciding meritorious constitutional §1983 cases by requiring special heightened pleading when there are no heightened pleading requirements for § 1993 cases and by erecting a statute of limitations bar dating from initial notification of incarceration to prevent inmates from contesting their continuing unconstitutional incarceration beyond their likely parole dates because of retroactive state action substantially extending their sentences to serve in violation of Ex Post Facto and Due Process protections?

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The denial of Petition for Rehearing and Petition for Rehearing En Banc of the United States Court of Appeals for the Eleventh Circuit, August 26, 2004, is set forth in the Appendix at A-1. The opinion of the United States Court of Appeals for the Eleventh Circuit, June 9, 2004, affirming the dismissal of Petitioners' action because of statute of limitations and heightened pleading requirement is set forth in the Appendix at A-3. The Order of the United States District Court for the Northern District of Georgia, September 10, 2002, dismissing Petitioner Coleman Jackson's action because of statute of limitations and dismissing all Petitioners' actions because of heightened pleading requirements is set forth in the Appendix at A -11. The Order of the United States District Court for the Northern District of Georgia, May 29, 2002, holding the retroactive application of the Georgia parole agency's unpublished ninety percent to serve policy extending Petitioner Jackson's sentence to serve in violation of Ex Post Facto protections of the United States Constitution is set forth in the Appendix at A-22.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on August 26, 2004. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I. SECTION 9. No…ex post facto law shall be passed.

ARTICLE I. SECTION 10. No State… shall pass any…ex post facto Law…

AMENDMENT V. No person shall be held to answer … nor be deprived of life, liberty, or property without due process of law;

AMENDMENT XIV. SECTION I. …nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

STATEMENT OF THE CASE

The statutory parole laws in Georgia provide for eligibility for parole after serving one-third of judicial sentences pursuant to O.C.G.A. § 42-9-45 (b) and the months to serve calculated according to the parole decision guidelines pursuant to mandate of O.C.G.A. § 42-9-40 (a). The statutorily parole laws provide for denial of release on an objective determination on an individual basis that an inmate's release on parole would not be compatible with the inmate's own welfare or the welfare of society pursuant to O.G.C.A. § 42-9-42 (c). After a legislative attempt failed to enact a requirement that all violent offenders serve their entire sentences, in order to satisfy the eighty-five percent of judicial sentences to serve requirement of the Violent Offenders Incarceration – Truth In Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq*. to qualify for federal grant funds to build new prisons, the Georgia State Board of Pardons and Paroles ("Board") adopted an unpublished resolution that all inmates in twenty violent and residential burglary offender categories must serve ninety percent of their sentences. (R-19-Exhibit A). The sentencing laws in Georgia provide for very long sentences which are substantially longer than most states sentencing laws and guidelines because the statutory parole laws contemplate that deserving inmates will be released after serving one-third of their judicial sentences or the months to serve calculated under the parole decision guidelines. Rather than reducing the sentencing periods as other states did in order to comply with the 85% requirement for funding pursuant to VIOTIS, Georgia went the other way and required that inmates in seven most serious violent offender categories serve mandatory sentences without parole, but when a similar legislative attempt failed to increase sentences to serve for other violent felonies, the Board adopted and retroactively implemented an unpublished "policy" that all offenders in

twenty other violent offense and residential burglary categories must serve ninety percent of their judicial sentences before being practically eligible for release on parole.

This unpublished policy had an unpublished "effective date" of January 1, 1998, but the Board slavishly applied the ninety percent to serve policy retroactively to inmates whose offenses were prior to January 1, 1998 to practically foreclose any parole until the inmates in the listed categories had served ninety percent of their sentences.

On May 29, 2002 United States District Court Judge William C. O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, United States District Court for the Northern District of Georgia, Civil No. 2:01-CV-068-WCO, held unconstitutional in violation of Ex Post Facto prohibitions the retroactive application to Petitioner Coleman Jackson of the unpublished policy of the Board which substantially extended Georgia inmates' sentences to serve to at least ninety percent of their judicial sentences. (A-44). Judge O'Kelley ordered the individual members of the Board (Respondents herein) to immediately consider the Petitioner Coleman Jackson for parole without regard to the ninety percent to serve policy. (A-44). The Board did not appeal Judge O'Kelley's Order holding the retroactive application of the ninety percent to serve policy unconstitutional and the Board thereafter released Coleman Jackson on parole.

As a result of Judge O'Kelley's holding the retroactive application of the ninety percent to serve policy unconstitutional, the members of the Board adopted a Resolution Amendment, dated September 9, 2002, acknowledging the illegality of the retroactive application of the ninety percent to serve policy and provided for reconsideration of parole for all inmates whose offenses were committed before January 1, 1998 who "shall be

considered for parole under the Parole Decision Guidelines that do not include the ninety percent policy." (R-19-Exhibit B). Of the approximately 2,200 inmates in the Class whose sentences had been retroactively extended, the Board ostensibly "reconsidered" 1,114 inmates and in no case did the Board follow the Parole Decision Guidelines, only giving token adjustments of a few months, and continuing the de facto ninety percent to serve policy in order to avoid the exact mathematical ninety percent. (Defendants Response-Docket-32-Exhibit 3). The resulting reconsideration of Petitioners and other inmates in the Class were still substantially retroactively extended by an average 5.6 years beyond the parole decision guidelines and still averaged 79% of their judicial sentences in order to continue to satisfy the 85 % VOITIS requirement when averaged with the seven serious violent felony sentences which legislatively require that 100 percent of judicial sentences be served. (Plaintiff's Response-Docket 50-Exhibit A).

Five Petitioners (Cleveland, Cummings, Sterling, Francis, and Wallace) whose sentences to serve had been retroactively substantially extended by the Board's de facto ninety percent substantially extended sentences to serve policy joined in the Amended Complaint – Class Action and Petitioner Coleman Jackson joined in the count for damages alleging that they were continuing to be retroactively and unconstitutionally incarcerated in violation of Ex Post Facto and Due Process beyond the time that they would have been released on parole under the parole laws and the Parole Decision Guidelines in effect at the time of commission of their offenses. But the Petitioners and similarly situated inmates in the proposed Class have been and are continuing to be completely foreclosed from parole because the Respondents as members of the Board adopted and are continuing to follow a de facto ninety percent or more extended sentences to serve policy which has had the retroactive effect of almost tripling their sentences to serve.

The Amended Complaint – Class Action was filed February 4, 2003 seeking equitable and other relief by the Petitioners and similarly situated inmates in the Class against the members of the Board who under color of law have retroactively completely foreclosed their eligibility for parole and continued their incarceration substantially beyond the time that they likely would have been released on parole under the enacted parole laws and the statutory mandated parole decision guidelines. Petitioners' Motions for Class Certification and Equitable Relief were denied by United States District Court Judge Willis B. Hunt on August 21, 2003 who granted the Respondents' Motion to Dismiss on the grounds that Petitioner Jackson's action for damages was bared by the two year statute of limitations to which Plaintiff Jackson argued that his continued incarceration beyond his likely sentence to serve under the existing legislatively enacted parole laws and the parole decision guidelines was a continuing constitutional violation for every day that he was unconstitutionally incarcerated under controlling United States Supreme Court precedents. (A-17). Judge Hunt dismissed the other Petitioners on the grounds that the cause of action brought under 42 U.S.C. § 1983 was subject to heightened pleading requirements which the Petitioners argued had been overruled by recent controlling Supreme Court precedents and that all the relevant detailed information had been furnished in subsequently filed pleadings. (A-20). Judge Hunt ordered the file closed and did not allow any curative amendments. (A-21).

An appeal was filed to the United States Court of Appeals for the Eleventh Circuit on August 25, 2003 and briefs were filed by the Petitioners demonstrating, *inter alia*, that: that the retroactive application of the unpublished de facto ninety percent extended sentences to serve policy is in violation of Ex Post Facto protections as interpreted by the United States Supreme Court; that the lack of fair legal

warning of the unpublished ninety percent to serve policy also violates Due Process; that the Petitioners' continued unconstitutional incarceration beyond the time that they likely would have been released on parole is a continuing constitutional violation which cannot be barred by the statute of limitations; that there are no heightened pleading requirements for § 1983 cases and that all the relevant facts had been furnished in subsequent pleadings.

After oral argument the Respondents obviously prompted by a representative of the Eleventh Circuit panel filed a subsequent Motion for the Court to Take Judicial Notice of Filing Documents showing when each of the Petitioners was first notified that their sentences would be retroactively and unconstitutionally extended. The panel on June 9, 2004 issued a decision without reaching the merits holding that all Petitioners were barred by the statute of limitations and that heightened pleading requirements were required for § 1983 civil rights cases in the Eleventh Circuit.(A-3). The Petitioners sought rehearing of the panel and en banc that both dispositive procedural issues were contrary to controlling United States Supreme Court precedents which was denied on August 26, 2004.

This Petition for Certiorari involves questions of exceptional constitutional importance of whether the Georgia Board should be constitutional allowed to retroactively substantially extend Petitioners' and similar situated inmates' sentences to serve following their unpublished de facto ninety percent to serve policy and should the District Court and the Eleventh Circuit continue to interpose strained procedural bars to meritorious constitutional actions under §1983 as was the practice previous to *Hope v. Pelzer*, 536 U.S. 730 (2002) and continues in the Eleventh Circuit decision still requiring heighten pleading and applying a statute of limitations bar to continuing unconstitutional incarceration of Petitioners and similarly situated inmates

whose sentences to serve have been retroactively extended by the Respondent's de facto ninety percent to serve policy beyond their likely release on parole under the statutory enacted parole laws and parole decision guidelines. There is now a conflict in the Circuits as to whether heighten pleading requirements apply to § 1993 cases.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals decision improperly avoided deciding an important federal question which should be decided by this Supreme Court as to whether by an unpublished policy a state parole agency can retroactively increase from one-third to de facto ninety percent the threshold for consideration and release on parole of Petitioners and similarly situated inmates in twenty violent offender categories in violation of Ex Post Facto and Due Process protections of the United States Constitution.

The panel decision continued a recent line of cases of the Eleventh Circuit of employing strained procedural bars to avoid reaching the merits of § 1983 cases. The Eleventh Circuit had previously uniquely required that a Plaintiff must produce a constitutionally decided case on all fours in order to maintain a § 1983 action involving qualified immunity until the Supreme Court reversed in *Hope v. Pelzer*, 536 U.S, 730 (2002). The Eleventh Circuit previously adopted heightened pleading requirements solely for § 1983 cases which has been superceded by the Supreme Court in *Crawford-el v. Britton,* 523 U.S, 574 (1997) and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). Now the Eleventh Circuit has applied a statute of limitation procedural bar to prevent inmates from contesting their continued incarceration beyond their sentences to serve which the Supreme Court has instructed is a continuing constitutional violation in *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

There is a conflict in the Circuits as to the requirements of heightened pleading in § 1983 cases following Supreme Court decision in *Crawford-el* and *Swierkiewicz.* The Eleventh Circuit continues to require heightened pleading in *GJR Investments, Inc. v. County of Escambia,* 132 F. 3d 1359 (11th Cir. 1998) and in the instant case. The Fifth Circuit has continued to require heightened pleading in *Nunez v. Simms*, 341 F. 3d 385, 388 (5th Cir. 2003). The Fourth, Sixth, and Tenth Circuits have abandoned the requirement of heightened pleading following *Crawford-el* and *Swierkiewicz* in *Trulock v. Freeh*, 275 F. 3d 391, 405 (4th Cir. 2001); in *Goad v. Mitchell*, 297 F. 3d 497, 504 (6th Cir. 2002); and in *Currier v. Doran,* 242 F. 3d 905, 916 (10th Cir. 2001).

I. THE RESPONDENTS HAVE VIOATED EX POST FACTO BY INCREASING THE PETITIONERS' AND SIMILARLY SITUATED INMATES' SENTENCES TO SERVE TO FORECLOSE CONSIDERATION OF THEIR RELEASE ON PAROLE UNTIL SERVING DE FACTO NINETY PERCENT OR MORE OF THEIR JUDICIAL SENTENCES THAT IS SUBSTANTIALLY BEYOND THE TIME THAT THEY WOULD LIKELY HAVE BEEN RELEASED ON PAROLE UNDER THE STATUTORY PAROLE LAWS AND THE PAROLE DECISION GUIDELINES IN EFFECT AT THE TIME OF COMMISSION OF THEIR OFFENSES

The fundamental issue is that the Respondents as members of the Georgia parole agency in adopting their unpublished ninety percent to serve policy thereby substantially extended sentences to serve to de facto ninety percent of judicial sentences before consideration for parole of the Petitioners as well as all inmates in twenty offense categories and then retroactively applied this unpublished

policy to significantly increase the sentences to serve to Petitioners' and the Class' prior offenses beyond their likely release on parole pursuant to the enacted parole laws providing for their likely release on parole after serving the statutory one-third threshold of their judicial sentences and the months to serve calculated pursuant to the parole decision guidelines in violation of the United States Constitutional protections of Ex Post Facto.

The precedents of the United States Supreme Court in the cases of *Garner v. Jones*, 529 U.S. 244 (2000) and *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) hold that retroactive actions relating to parole violate the Ex Post Facto prohibitions of the United States Constitution when the practical result of implementation of actions by a parole agency creates a significant risk of prolonging an inmate's incarceration. In both of these cases the United States Supreme Court ruled that a procedural change in the frequency of review for inmates serving life sentences did not necessarily violate the Ex Post Facto prohibitions. But relevant to the instant case in both of these cases the United States Supreme Court instructed that parole actions which retroactively increase the likelihood or sufficient risk of prolonging inmates' incarcerations would violate the Ex Post Facto prohibitions of the United States Constitution. It is patently obvious that the actions of the Board in applying the de facto ninety percent to serve policy to every inmates' existing sentence to serve significantly increasing the duration of their sentence to serve beyond the statutory parole thresholds for release on parole is retroactively increasing their punishment in violation of Ex Post Facto prohibitions. This was the holding of United States District Court Judge O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, United State District Court for the Northern District of Georgia, Civil Action No. 2:01-CV-068-WCO (2002) which applied to the individual case of Coleman Jackson and he found that it was not

necessary for this "policy" to be a law or regulation, only that its "practical implementation" produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. (A-34). The Respondents as members of the Board did not appeal Judge O'Kelley's Order and are now estopped to deny that the retroactive application of the ninety percent to serve policy does not violate the Ex Post Facto prohibitions of the United States Constitution.

It is a mathematical certainty that this retroactive change increases the likelihood and the sufficient risk that the Petitioners' and all other similar situated inmates' extended sentences to serve will be increased at least from the statutory one-third threshold or the months to serve calculated under the parole decision guidelines to a de facto minimum of ninety percent of judicial sentences to serve. After review of the statistical evidence Judge O'Kelley analyzed that "the Board deviated below the 90% threshold in exactly 10 cases out of 8,664. (A-40). "Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero" and the previous District Court decision found that "the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates." (A-40). Judge O'Kelley also found that previous to the implementation of the ninety percent to serve policy that the Petitioner Coleman Jackson would likely have been paroled in accordance with the tentative parole month calculated under the parole decision guidelines. (A-43).

In the cases of the Petitioners joining the Amended Complaint two (Sterling and Wallace) remain unchanged and in three (Cleveland, Cummings and Francis) the Board only made a token adjustment of a few months to avoid the exact mathematical ninety percent. (R-19-Para 18). The practical effect is that the Board has adopted a policy of following a de facto ninety percent to serve policy retroactive to offenses

committed before its effective date. (Defendants' Response, Docket 32-Exhibit 3; Plaintiffs' Reply, Docket 5- Exhibit A).

The overriding economic motivation for the Respondents' adoption of the ninety percent to serve policy was the fact that the State of Georgia had applied for to become the recipient of very substantial federal grant funds to build new prisons under the Violent Offenders Incarceration - Truth in Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq.* This Act required that the average time to serve of judicial sentences must be at least 85% for a substantially similar list of violent offenses to the Boards' ninety percent to serve policy in order to qualify for the grant funds to build prisons. Specifically, the grant guidelines pursuant to 42 U.S.C. § 13704 (a) (1) require that to be eligible to receive the grant funds to build prisons that within three years:

> "(A) (i) such State has implemented truth in sentencing laws that require persons convicted of a part I violent crime to serve not less than 85 percent of the sentence imposed...(C)(ii) persons convicted of a part I violent crime on average serve not less than 85% of the maximum prison term allowed under the sentence imposed by the court."

In order to qualify for VOITIS grant funds two legislative Bills had been introduced for passage in the Georgia legislature: one which was enacted as O.C.G.A. § 10-10-6.1 requiring that offenders convicted of the seven most serious violent offense categories serve one hundred percent of their sentences, and another, S.B. 100 (1997), which was defeated required that other violent felons serve the extended time of their sentences. After the legislative attempt failed to enact the extended time to serve law for the other violent offense categories, Georgia turned to the

Respondent members of the Board to adopt the ninety percent to serve policy having the practical force of law since they exercise exclusive control of parole eligibility. Georgia specifically spotlighted and cited to the Board's ninety percent to serve policy in its VOITIS application for federal grant funds. The Georgia "1998 Application for Violent Offenders Incarceration and Truth in Sentencing Incentive Grant" evidences that the ninety percent to serve policy was adopted to qualify for VOITIS grant funds. This Georgia application explains in bold type the Board's extended time to serve "policy" changes that were in effect tantamount to law in order for Georgia to be eligible for grant funds that: "The new policy makes it mandatory that these violent offenders serve 90% of their court imposed sentence prior to consideration of parole." A 1998 Supplemental Application even attaches a State Board of Pardons and Paroles' news release and explanation of the Board's "Amended Policy for the Parole of Violent Offenders" in order to quality for tier two VOITIS grant funds. (Plaintiffs' Response, Docket 44-Exhibits A, B). Georgia was then successful and did receive funds through FY 2000 for a total of $82,236,509 received from the federal government under VOITIS. (Plaintiffs'Response, Docket 44-Exhibit C).

As a result of Judge O'Kelley's holding their ninety percent to serve policy unconstitutional, the members of the Board adopted a Resolution Amendment, dated September 9, 2002, acknowledging the illegality of the retroactive application of the ninety percent to serve policy and provided for reconsideration of parole for all inmates whose offenses were committed before January 1, 1998 "shall be considered for parole under the Parole Decision Guidelines that do not include the ninety percent policy." (R-19-Exhibit B). Of the approximately 2,200 inmates in the Class whose sentences had been retroactively extended, the Board "reconsidered" 1,114 inmates and in no case did the Board

follow the Parole Decision Guidelines, only giving token adjustments, and continuing the de facto ninety percent to *serve policy in order* to avoid the mathematical ninety percent. (Defendants Response-Docket-32-Exhibit 3).

The result of the ostensibly "re-considered sentences under the parole decision guidelines" (R-19-Exhibit B) still averaged for the Petitioners and the proposed Class a retroactive increase of 5.6 years to serve above parole decision guidelines (O.C.G.A. § 42-9-40) and average of 79.0% of the judicial sentences verses the one-third of judicial sentences statutory threshold for parole (O.C.G.A. § 42-9-45) for the categories of offenses listed in the ninety percent to serve Resolution of December 9, 1997. (Plaintiffs' Response, Docket 50-Exhibit A). The substantially extended sentences to serve of 79% of judicial sentences when averaged in with the inmates required to serve 100% of their judicial sentences whose offenses are listed in the seven serious violent offense legislation (O.C.G.A. § 17-10-6.1) will no doubt comfortably average above the 85% requirement to continue to quality for federal grant funds under VOITIS.

Thus the Faustian deal, motivated to receive VOITIS grant funds, traded the freedom of the Petitioners' and many, many other inmates to substantially extend their sentences to serve de facto ninety percent or more for the receipt by Georgia of over eighty-two million dollars in federal grant funds to build new prisons. It is constitutionally shocking that in order to receive VOITIS federal grant funds, Georgia had to and did increase its parole threshold for inmates in twenty offender categories from one-third to de fact ninety percent of judicial sentences by the Respondents administratively adopting an unpublished policy having the practical force and effect of law that substantially and retroactively extended Petitioners' and similarly situated inmates' sentences by the de facto ninety percent.

In fact no Petitioner or other inmate in the proposed Class has been considered for parole in accordance with the parole decision guidelines under which they routinely and likely would have formerly been released on parole on their temporary parole months calculated under the parole decision guidelines.. So the Respondents as members of the Board had to and did maintain at least the grant qualifying 85 % average time to serve for Georgia's violent offenders and is continuing to follow the de facto ninety percent policy to substantially extend the Petitioners' and other similarly situated inmates' sentences to serve retroactively.

Weaver v. Graham, 450 U.S. 24, 30 (1981) teaches: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was proscribed when the crime was consummated." (Emphasis supplied). *Weaver* is in a long line of United States Supreme Court cases holding that Ex Post Facto is violated when a state changes the rules to extend the time for consideration for parole and that state acts must give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. (Emphasis supplied) citing *Dobbert v. Flordia*, 432 U.S. 282, 298 (1977*); Kring v. Missouri,* 107 U.S. 221, 229 (1883), 450 U.S. 24, 28-9. *Weaver* is also instructive that, "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." Citing *Cummings v. Missouri*, 4 Wall. 277, 325 (1865). 450 U.S. 24, note 15. (Emphasis supplied). Also relevant to the instant case, *Weaver* reaffirmed that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to pleas bargain and the judge's calculation of the sentence

to be imposed." Citing *Wolf v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). 450 U.S. 24, 32. *Weaver* concludes: "The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." 450 U.S. 24, 30.

The teachings of Garner v. *Jones*, supra, and *California Department of Corrections v. Morales*, supra, forbid any "practical implementation by the agency charged with exercising discretion", (*Garner* at 255), which created a "sufficient risk" of retroactively increasing an inmates punishment (*Morales* at 509). This "sufficient risk" of retroactively increasing an inmate's punishment arises to a certainty under the Respondents' de facto ninety percent to serve policy.

II. APPLICATION OF THE UNPUBLISHED NINETY PERCENT TO SERVE POLICY WITHOUT FAIR LEGAL NOTICE TO SUBSTANTIALLY EXTEND SENTENCES TO SERVE BEYOND THE ENACTED PAROLE LAWS AND THE PAROLE DECISION GUIDELINES VIOLATES DUE PROCESS

The actions of the Respondents in retroactively increasing the sentences to serve of the Petitioners and similarly situated inmates without fair warning also violates Due Process. *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994), which was decided on the now overruled search for mandatory state language test that in *Sandin v. Conner*, 515 U.S. 472, 483 (1995) was abandoned by the United States Supreme Court in favor of "real concerns under girding the liberty interest protected by the Due Process Clause." *Sultenfuss* which is a due process case would not apply to the

substantial Ex Post Facto violations by the State Board nor is *Sultenfuss* still the law in light of the Supreme Court's subsequent and now controlling decisions of *Garner v. Jones*, supra, *California Department of Corrections v. Morales*, supra, and *Sandin v. Conner*, supra. The practical realities test of *Garner* and *Morales* to determine a sufficient risk of Ex Post Facto violation and the real concerns under girding the liberty interest protected by the Due Process clause announced in *Sandin* now determine protected liberty interests, not the presence or absence of state mandatory language. The Supreme Court has now held that the "Due Process clause of its own force" may create a protected liberty interest" (*Sandin* at 474) and that the practical realities of creating a sufficient risk of retroactively increasing an inmate's punishment violate Ex Post Facto (*Morales* at 509 and *Garner* at 255). Thus, the controlling Supreme Court law has changed from *Sultenfuss*' state mandatory language analysis to now look to the practical realities of the state action under *Sandrin* which the Georgia Board has retroactively created as a very substantial and certain retroactive increase in the Plaintiffs' and similarly situated inmates' sentences to serve. The real concerns of Due Process when viewed against the Ex Post Facto practical realities of what the Georgia Board has done to retroactively and substantially increase the sentences of inmates should at least recognize their liberty interest not to have their Due Process rights continue to be egregiously violated without legal fair warning.

The enforcement of the de facto ninety percent to serve policy cannot be constitutionally enforced because this policy is not legally published and filed in accordance with the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-3. The unpublished ninety percent to serve policy internally "resolved" by the Board members cannot qualify as a prospective rule or regulation and it is contrary to the enacted parole laws. Therefore, the ninety percent to serve

policy cannot be a valid rule or regulation, and this unpublished policy cannot be implemented without following the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1, *et seq.,* giving prospective notice to the public in accordance with its requirements. Yet the unpublished de facto ninety percent to serve policy is slavishly enforced as a de facto law and its effect on the Petitioners and similar situated inmates is to practically completely foreclose any opportunity for parole until they have served a de facto ninety percent or more of their judicial sentences It gives no legal notice to the public, and is not a policy, rule or regulation pursuant to which the Board may validly enforce their de facto ninety percent to serve policy to extend the duration of inmates' sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

It is obvious that the Respondents' actions as members of the Board under color of law in applying the de facto ninety percent to serve policy has significantly increased the duration of the sentences to serve of the Petitioners and similarly situated inmates beyond the statutory parole thresholds which was and still is being retroactively applying the extended ninety percent policy in violation of the Ex Post Facto prohibitions and Due Process protections of fair warning.

III. STATUTE OF LIMITATIONS DATING FROM INITIAL NOTIFICATION OF INCARCERATION CANNOT BE A BAR TO CONTINUING UNCONSTITUTIONAL VIOLATIONS WHICH CAUSE PRISONERS TO BE INCARCERATED BEYOND THEIR LIKELY RELEASE ON PAROLE BECAUSE OF RETROACTIVE STATE AGENCY PAROLE ACTION SUBSTANTIALLY EXTENDING THEIR SENTENCES TO SERVE IN VIOLATION OF EX POST FACTO AND DUE PROCESS

The Petitioners cannot be barred by the statute of limitations for violations of their civil and constitutional rights which continue every day that they are required to continue to be incarcerated beyond their likely release on parole under the applicable parole laws and the parole decision guidelines in violation of the Ex Post Facto prohibitions of the United States Constitution.

The District Court's Order found that the statute of limitations began to run for Petitioner Coleman Jackson when he was notified that he would be considered for parole under the Board's ninety percent to serve policy. (A-15 to 17). The Petitioners and other inmates did not realize the effect of the policy until after their consideration for parole was demanded under the parole laws and guidelines in effect at the time they committed their offenses and the Respondents refused or failed to consider or reconsider them for parole. The demands that the named Petitioners and similarly situated inmates be considered for release on parole under the parole laws and regulations in effect at the time of commission of their offenses all occurred within the previous six months to the filing of the Amended Complaint. The holding of *Coleman Jackson v. State Board of Pardons and Paroles*, supra, in which District Court Judge O'Kelley specifically found that October 2001 was the date that the Petitoner, Coleman Jackson, should have been considered for parole had the Board not retroactively applied its ninety percent to serve rule. (A-43). It was by failing to consider Coleman Jackson for parole on that date, October, 2001, that the Respondents began violating the Ex Post Facto prohibitions by continuing the duration of his incarceration beyond his likely sentence to serve; it was on that date that his injury began. It thereafter continued day to day until he was considered for parole and finally released from prison. This is the same as not granting an incarcerated prisoner release at the end of a juridical sentence. Parole laws modify

judicial sentences to establish the duration of the sentences to serve. No one would seriously contest that a statute of limitations could not prevent an inmate's release after serving of the judicial sentence which would be a continuing constitutional violation. The preventing of an inmate's release on the likely parole date through retroactive increase in punishment is the same continuing constitutional violation.

The notice received by Coleman Jackson and the other named Petitioners stated that the parole month was "tentative." The notice reserved the right of the Board members to change their decision at any time. In fact, the Board's Rules and Regulations state that the decisions of the Board may be reviewed and changed at any time by the Board. The Attorney General of Georgia representing the Board before the United States Supreme Court so stated that, under the Board's rules, the Board takes requests for review of its decisions at any time; this became the basis of the Court's decision in *Garner v. Jones,* supra.

Thus, the notice sent by the Respondents was not a final act that could have given Petitioners the right to sue. It was only a tentative statement of a planned exercise of discretion; it was not the act of discretion itself. The Petitioners' right to sue could not have arisen, at the earliest, until the Petitioners demanded and the Respondents refused or failed to grant them parole consideration as it should have done pursuant to the statutory parole laws and the parole system guidelines in effect when their offenses were committed. Coleman Jackson and the other Petitioners did not suffer any injury – a prerequisite for the running of the statute of limitations – until the date passed upon which they would have been considered for parole under the parole guidelines in effect at the time they committed their offenses.

Thereafter, each day that the Respondents have continued Petitioners' unconstitutional incarceration beyond the time that they should have been released on parole constitutes a new violation of their constitutional rights. The action of the Board is de facto extending the Petitioners' sentences to serve beyond their likely sentences to serve at the time of commission of their offences and every day thereafter that they are forced to serve is a separate constitutional deprivation. The plight of Petitioners and similarly situated inmates is reminiscent of the despair of the Man in the Iron Mask in Alexander Dumas novel who was perpetually imprisoned with no hope of relief. The Petitioners' and the Class' only hope for release from the retroactive imposed severe extended sentence to serve now rests on the consideration of this United States Supreme Court granting this Petition for Certiorari to which Petitioners submit that the serious constitutional issue are worthy of Certiorari.

The statute of limitations procedural bar to continuing unconstitutional incarceration was not even argued by the Respondents other than against Petitioner Coleman Jackson who was the only Petitioner to which the statute of limitations bar was applied in the underlying Order by the District Court. (A-17, 18). The Eleventh Circuit panel after briefing and argument interjected the issue to recognize a statute of limitation bar of all Petitioners because of initial notices which were based on the adjudicated and admitted unconstitutional actions of the Respondents as members of the Board. These notices were or should have been superceded by "reconsidered" notices of Temporary Parole Months following the holding by Judge O'Kelley, in *Coleman Jackson v. State Board of Pardons and Paroles*, Civil Action No 2:01-CV-068-WCO (N.D, Ga. 2002) that the retroactive application of the ninety percent to serve policy violated the Ex Post Facto protections of the United States Constitution. The Respondents as members of the

Board subsequently on the advice of the Office of the Attorney General acknowledged by Resolution Amendment on September 9, 2002 the unconstitutionally of the retroactively applied ninety percent to serve policy and ostensibly reconsidered all inmates whose sentences to serve were retroactively substantially extended under the ninety percent to serve policy to be reconsidered in accordance with the Parole Decision Guidelines and without regard to the ninety percent to serve policy. These notices of reconsiderations were sent or should have been sent to the Plaintiffs and similarly situated inmates following this Resolution Amendment within a few months previous to the filing of this class action and well within the two year statute of limitations.

The Eleventh Circuit panel cites *Brown v. Georgia Board of Pardons and Paroles*, 335 F. 3d 1259 (11th Cir. 2003) and *Lovett v. Ray*, 325 F. 3d 1181 (11th Cir. 2003) as authority to invoke a statute of limitations bar to the civil rights action of the Petitioners who continue every day to be incarcerated beyond the time that they likely would have been released on parole but for the Ex Post Facto constitutional violation substantially extending their sentences to serve. These cases all contested the *procedural timing* of the frequency of review of life sentences, but they would not be a bar to the *substantive extending* of the Petitioners' sentences to serve which is a continuing violation. This similar distinction was made by the United States Supreme Court in the precedent cases in *Garner v. Jones* and *California Department of Corrections v. Morales*, which gave only qualified approval to the procedural intervals of extended timing of review of life sentences, but would strike down as substantively continuing violations if the practical result was to likely to extend inmates' sentences to serve in violation of Ex Post Facto. The panel decision of the Eleventh Circuit would have the effect of perpetually imprisoning an inmate with no remedy who waited over two

years after being notified that he would have to remain imprisoned substantially beyond the end of his sentence.

The United States Supreme Court in *Spencer v. Kemna*, supra at 7, instructs that constitutional injury causing incarceration continues throughout incarceration and even after the sentence has expired there are "concrete and *continuing injury*" when there are parole restrictions. (Emphasis supplied). Every day is a continuing constitutional violation of being incarcerated beyond the time when they were entitled to be released. Holding inmates beyond their sentences to serve until they likely would have been paroled is analogous to the continual constitutional violation of holding an inmate beyond the limits of a judicial sentence. The flawed reasoning of the panel is demonstrated by parody of reasoning that an inmate who was notified that his sentence to serve would be extended beyond the judicial sentence would have not any recourse two years after receiving the constitutionally defective notice even though every day is a continuing violation of the inmate's constitutional rights. Such a result would be legally and constitutionally absurd. The continued unconstitutional incarceration of the Petitioners are continuing constitutional violations continuing every day of the illegal incarceration of the Petitioners and similarly situated inmates beyond their sentences to serve in accordance with the enacted parole laws and the Parole Decision Guidelines determining their temporary parole months, the date when Judge O'Kelley found that inmates likely would have been released on parole. (A-43).

IV. THERE IS A CONFLICT IN THE CIRCUITS FOLLOWING UNITED STATES SUPREME COURT PRECEDENTS INSTRUCTING THAT THERE ARE NO HEIGHTENED PLEADING REQUIREMENTS FOR § 1983 CASES

The Eleventh Circuit panel decision that the Petitioners did not satisfy heighten pleading requirements for §1983 actions is contrary to the United States Supreme Court precedent directing that there are no heighten pleading requirements in §1983 cases and that the notice pleading satisfying FRCP 8(a) dictates are the standard in *Crawford-el v. Britton,* 523 U.S, 574 (1997) and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). The Fifth Circuit has also continued to require heightened pleading in §1983 cases in *Nunez v. Simms*, supra. Other Circuits have rendered decisions that § 1983 cases are subject to FRCP Rule 8 (a) and that there are no heighten pleading requirement: Fourth Circuit in *Trulock v. Freeh*, supra at 405 ("The liberal pleading requirements of Rule 8(a) demand only a 'short and plain' statement of the claim"); Sixth Circuit in *Goad v. Mitchell*, supra, at 504 ("the Supreme Court in *Crawford-El* clearly rejected circuit-created heightened pleading requirements); the Tenth Circuit in *Currier v. Doran,* supra, at 916 ("heightened pleading requirement cannot survive *Crawford-El*").

The panel decision did not address the fact that subsequent supplemental pleadings did contain the relevant specifics on every Petitioner when each receive the notice of their reconsidered temporary parole month which were within several months previous to the filing of the Amended Complaint – Class Action and well within even the Respondents' contended two year statute of limitation. The supplement pleading also gave the specific temporary parole months calculated as the exactly when each Petitioner would have likely have been released on parole but for the constitution violations by the Respondents in retroactively substantially extending their sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

In spite of attempts to put heightened pleading requirements on § 1983 cases, the United States Supreme Court has rejected such attempts in *Crawford-el v. Britton* and recently in *Swierkiewicz v. Sorema* recently rejected such heightened pleading requirements in §1983 cases reaffirming that:

> "Rule 8(a)'s simplified pleading standard applies to all civil action, with limited exceptions. Rule 9(a), for example, provides for greater particularity in all averments of fraud or mistake.[footnote omitted] This Court, however, has declined to extend such exceptions to other contests... Just as Rule 9(a) makes no mention of municipal liability under Rev. Stat. §1979, 42 U.S.C. §1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most other, must satisfy only the simple requirement of Rule 8(a)." *Id.* at 509.

The Amended Complaint – Class Action alleged under notice pleading in accordance with Rule 8(a) that the Petitioners' and similarly situated inmates' sentences to serve had been reconsidered in bad faith and their sentences to serve continued to be retroactively substantially increased by the Respondents under their de facto ninety percent to serve policy. The Amended Complaint also, *inter alia,* alleged that their sentences to serve had been substantially extended by the Respondents beyond their thresholds for parole eligibility when they "were entitled to be considered for parole after serving the greater of one-third of their sentences pursuant to the enacted parole laws, O.C.G.A. § 42-9-45, or the month to serve calculated under the legislatively mandated Parole Decision Guidelines pursuant to O.C.G.A. § 42-9-40 to arrive at a Tentative Parole Month

after which inmates would normally be routinely consider for release on parole." (R-19-Paragraph 11).

All the elements of the cause of action and relief for the Petitioners and similarly situated inmates in the Class were properly pled as well as establishing the cause of action against the Respondents for equitable relief seeking to require that the Board to immediate reconsider Petitioners and inmates in the Class for parole in accordance with the parole laws and Parole Decision Guidelines in effect at the time of commission of their offense without regard to the de facto ninety percent to serve policy substantially extending their sentences to serve in violation of the Ex Post Facto protections. The Amended Complaint clearly alleges and demonstrates that "through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Garner v. Jones*, supra, at 255.

The District Court Order dismissing the Amended Complaint with a specifically pled cause of action complying with FRCP Rule 8(a) applicable to all Petitioners and the Class and requiring heightened pleading is reminiscent of the demerrer era of more than a half century ago. The Amended Complaint did sufficiently state a cause of action for all the joined Petitioners and similarly situated inmates in the Class as to when each of the Petitioners and members of the Class would likely became eligible for parole under the parole laws and the parole decision guidelines and individual calculation of their likely parole months under the parole laws and the parole decision guidelines were filed with theDistrict Court in the Supplemental Response.

The Plaintiffs filed a Supplemental Response to Motion to Dismiss Amended Complaint which included specific dates and even attached each Plaintiffs' notification

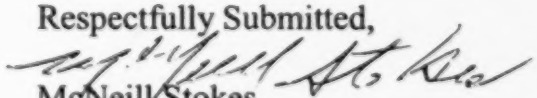
of their revised Tentative Parole Month under the de facto ninety percent to serve policy and included a calculation under the enacted parole laws and the Parole Decision Guidelines of the Tentative Parole Dates when each Plaintiff should have been considered for parole and likely would have been released on parole. (R-31).

The harsh facts alleged in the Amended Complaint as well as demonstrated with filed documents in the record are that the Petitioners and similarly situated inmates in the Class have been and are still being retroactively extended in their incarceration by the Respondents' following a de facto ninety percent to serve policy of substantially extending their sentences to serve by almost triple the time to serve before being eligible for release on parole substantially beyond the time that they routinely would have been likely released on parole under the parole laws in effect at the time of commission of their offenses which are a one-third threshold for eligibility for parole under O.C.G.A. § 42-9-45 and the time to serve calculated under the Parole Decision Guidelines mandated under O.C.G.A. § 42-9-40. Their eligibility for parole was administrative foreclosed and their sentences substantially extended to the de facto ninety percent to serve threshold and retroactively applied by the Respondents to the Petitioners and other similarly situated inmates sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

CONCLUSION

The retroactive application of the de facto ninety percent to serve policy substantially extending sentences to serve beyond the time that Petitioners and similarly situated inmates would likely have been released on parole violated the Ex Post Facto and Due Process protections of the United States Constitution. The Amended Complaint clearly stated a cause of action for the Petitioners and similarly situated inmates whose sentences have been extended and should not have been dismissed without an opportunity to amend to include specifics which had already been filed of record. The statute of limitation for an Ex Post Facto incarceration continues while inmates remain unconstitutionally incarcerated beyond the duration of their likely sentence to serve. The Respondents are not entitled to qualified immunity when they had general and actual knowledge that their retroactive substantial extensions of Petitioners' and similarly situated inmates' sentences to serve was in violation of the Ex Post Facto prohibitions of the United States Constitution. For the Constitution to have effect, the employment of strained procedural bars must recede and the merits must be reached in §1983 cases such as this case involving one of the most massive civil rights abuses of the latter part of the twentieth century encompassing thousands inmates have had their sentences to serve retroactively almost tripled and have been de facto foreclosed from parole under the enacted parole laws and mandated guidelines.

Respectfully Submitted,



McNeill Stokes
Attorney for Petitioners

1040 Peachtree Battle Ave.
Atlanta, Georgia 30327
Telephone: 404-352-2144
Facsimile: 404-367-0353

No. _____

In The Supreme Court of the United States

COLEMAN JACKSON; THOMAS A. CLEVELAND; LARRY CUMMINGS, JR.; STEVEN CRAIG STERLING; FRANKLYN FRANCIS; KENNETH A. WALLACE; NAJIY-ULLAH AZIYZ,

Petitioners,

v.

WALTER S. RAY, JR.; BOBBY K. WHITWORTH; JIM WETHERINGTON; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; MILTON E. NIX, JR.; MICHAEL LIGHT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX

MCNEILL STOKES
1040 Peachtree Battle Avenue
Atlanta, Georgia 30327
Telephone: (404) 352-2144
Facsimile: (404) 367-0353

Attorney for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14337

D.C. Docket Nos. 02-03176-CV-WBH-1

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT
Aug 26, 2004
THOMAS K.
KAHN
CLERK

COLEMAN JACKSON, NAJIY-ULLAH AZIYZ,
THOMAS A. CLEVELAND, LARRY CUMMINGS, JR.,
STEVEN CRAIG STERLING, FRANKLYN FRANCIS,
KENNETH A. WALLACE,

Plaintiffs-Appellants,

versus

WALTER S. RAY, JR., JAMES E. DONALD,
GARFIELD HAMMONS, JR.,
BETTY ANN COOK, EUGENE P. WALKER,
MILTON E. NIX, JR., J. MICHAEL LIGHT, et al.,

Defendants-Appellees,

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION (S) FOR REHEARING AND PETITION (S)
FOR REAHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____F.2d _____)

Before BIRCH, MARCUS and BRUNETTI*, Circuit Judges.

* Honorable Melvin Brunetti, United States Circuit Judge for the Ninth Circuit Court of Appeals sitting by designation.

Before BIRCH, MARCUS and BRUNETTI*, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 350, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5, the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

s/ STANLEY F. BIRCH, JR.

UNITED STATES CIRCUIT JUDGE

* Honorable Melvin Brunetti, United States Circuit Judge for the Ninth Circuit Court of Appeals sitting by designation.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 9, 2004
THOMAS K. KAHN
CLERK

No. 03-14337

D.C. Docket Nos. 02-03176-CV-WBH-1

COLEMAN JACKSON, NAJIY-ULLAH AZIYZ, THOMAS A. CLEVELAND, LARRY CUMMINGS, JR., STEVEN CRAIG STERLING, FRANKLYN FRANCIS, KENNETH A. WALLACE,

Plaintiffs-Appellants,

versus

WALTER S. RAY, JR., JAMES E. DONALD, GARFIELD HAMMONS, JR., BETTY ANN COOK, EUGENE P. WALKER, MILTON E. NIX, JR., J. MICHAEL LIGHT, et al.,

Defendants-Appellees,

Appeal from the United States District Court for the Northern District of Georgia

(June 9, 2004)

Before BIRCH, MARCUS and BRUNETTI*, Circuit Judges.

* Honorable Melvin Brunetti, United States Circuit Judge for the Ninth Circuit Court of Appeals sitting by designation.

Before BIRCH, MARCUS and BRUNETTI*, Circuit Judges.

BRUNETTI, Circuit Judge:

On August 4, 1999, Coleman Jackson ("Jackson") was convicted of aggravated assault for firing a gun at Shirley Ann Welch and then striking her with a pistol. He was subsequently sentenced to twenty years in prison, with five years to serve. This appeal is premised on actions the Georgia Board of Pardons and Paroles ("the Board") took between the date Jackson assaulted Ms. Welch, August 26, 1996, and when he was ultimately convicted.

On December 9, 1997, the Board adopted a policy that required inmates convicted of twenty enumerated offenses, including aggravated assault, to serve ninety percent of their sentences before becoming eligible for an initial parole hearing. The Board's previous policy, however, required prisoners convicted of aggravated assault only to serve a minimum of one-third of the prison term imposed by the sentencing court before becoming eligible for an initial parole hearing. The Board's new policy was applied retroactively to every conviction entered on or after January 1, 1998, regardless of the date when the criminal conduct occurred.

On October 2, 2000, Jackson was considered for parole and was advised, based upon the "ninety percent" policy, that his tentative parole month was set for June 2003. Based on the previous "one-third" policy, Jackson expected an initial parole eligibility hearing in August 2000. Jackson

---

* Honorable Melvin Brunetti, United States Circuit Judge for the Ninth Circuit Court of Appeals sitting by designation.

appealed to the Board, arguing an *ex post facto* violation. The Board denied Jackson's appeal.

On April 25, 2001, Jackson filed a joint motion for a writ of habeas corpus and a complaint for damages and equitable relief against the Board pursuant to 42 U.S.C. § 1983. In that case the district court found that the ninety percent policy violated Jackson's constitutional right against *ex post facto* laws and enjoined the Board from taking any action to enforce the policy. The Board never appealed this decision by the district court. The Board reconsidered Jackson's parole and he was released from custody on July 17, 2002.

On September 9, 2003, the Board amended its policy to apply only to those people who committed a crime on or after January 1, 1998. The Board then reconsidered the parole status of all individuals who had committed crimes prior to January 1, 1998 without consideration of the ninety percent policy.

On November 22, 2002, Jackson filed this 42 U.S.C. § 1983 cause of action against the board members in their individual capacities, seeking damages for unlawful imprisonment as a result of the board members' application of the ninety percent policy in violation of the *ex post facto* prohibitions of the United States and Georgia Constitutions, and unspecified state and federal laws. On February 4, 2004, Jackson filed an amended complaint adding Appellants Thomas A. Cleveland, Larry Cummings, Jr., Steven Craig Sterling, Franklyn H. Francis, and Kenneth A. Wallace and, among other things, moved for class certification. The additional Appellants – who are still incarcerated – also allege that the board members were still applying the ninety percent policy to them despite the board's assertion that it recalculated each of their sentences without applying the

policy. The board members moved to dismiss all of the claims.

The district court granted the board members' motion to dismiss Jackson's amended complaint because the applicable two-year statute of limitations for Jackson's cause of action had expired. The district court also granted the board members' motion to dismiss the remaining Appellants' amended complaint because it failed to state a claim. The district court did not grant the board members' motion to dismiss the remaining Appellants' amended complaint on statute of limitations grounds because it did not have information before it demonstrating when the remaining Appellants' received notice the ninety percent policy would be applied to them. We, however, granted a motion to supplement the record and have before us documents demonstrating that the remaining Appellants failed to file their claims until two years after they received notice that the ninety percent policy would be applied to them.

DISCUSSION

A district court may dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991). In evaluating a motion to dismiss for failure to state a claim, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. Peterson v. Atlanta Housing Auth., 998 F.2d 904, 912 (11th Cir. 1993). However, "conclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002).

A. Standard of Review

We review a district court's grant of a motion to dismiss de novo. Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997). Dismissal is appropriate if it appears, beyond a reasonable doubt, that the Plaintiff can prove no set of facts that would entitle him to relief. Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1495 (11th Cir. 1974). We may affirm for any reason supported by the record, even if not relied on by the district court. Cochran v. United States Health Care Financing Admin., 291 F.3d 775 778 n.3 (11th Cir. 2002).

B. Statute of Limitations

Georgia's two-year statute of limitations for personal injury actions applies to § 1983 claims. Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) (holding that "[f]ederal courts apply their forum state's statute of limitations for personal injury actions to actions brought pursuant to 42 U.S.C. 1983."). In Lovett, a state prisoner filed a § 1983 complaint against the State of Georgia, alleging that the defendants violated his constitutional right against *ex post facto* laws by changing the frequency of his parole reconsideration hearings. Lovett was notified in September of 1998 that he would not be reconsidered for parole until 2006. He did not file his complaint, however, until August 10, 2001. Generally, "the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Id. (quoting Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996)). Lovett's action was barred by the statute of limitations because when he was notified that he would not be reconsidered for parole until

2006, "he knew, or should have known, all of the facts necessary to pursue a cause of action." Id.

The Appellants, much like Lovett, knew, or at least should have known, all the facts necessary to support their § 1983 causes of action when the board notified them that their parole hearing would be postponed until they served ninety percent of their sentences. Indeed, Appellant Jackson's own actions show that he knew or should have known as he actually initiated several challenges to the ninety percent policy when he learned of its application to him. Only twenty days after the board informed Jackson of the retroactive application of the policy to him, he appealed to the board on the theory that the retroactive increase violated his constitutional right against *ex post facto* laws. Then, within seven months of being notified of the policy's application, Jackson filed a joint motion for writ of habeas corpus in the federal district court.

The Appellants' argument that their claims are not time barred because of the continuing violations doctrine is similarly unpersuasive. This court has held that when a defendant's act is a one time violation with continued consequences, the continuing violation doctrine is not applicable. Brown v. Georgia Board of Pardons and Paroles, 335 F.3d 1259, 1291 (11th Cir. 2003) (noting that "each time [a prisoner's] parole reconsideration hearing is set, it does not amount to a distinct and separate injury."); Lovett v. Ray, 327 F.3d at 1183 ("The critical distinction in the continuing violation analysis is whether the plaintiff[] complain[s] of the present consequence of a one time violation, which does not extend the limitations period, or the continuation of that violation into the present, which does."). The board members here made the one time decision to apply the ninety percent policy to those convicted of certain offenses. That one time decision had the continued consequence of the Appellants

serving ninety percent of their sentences before being considered for parole. Because the Appellants filed the underlying suit after the applicable statute of limitations period expired, the district court properly granted the board members' motion to dismiss the Appellants' claims premised on the board member's application of the ninety percent policy.

C. Heightened Pleading Requirement

In addition to the Appellants alleging that the board members' prior application of the ninety percent policy to them violated their constitutional right against *ex post facto* laws, Appellants Cummings, Sterling, Francis, and Wallace allege that despite the board's assertion to the contrary, it is still applying the ninety percent policy to them in violation of the prohibition on *ex post facto* laws. Because these remaining Appellants allege a cause of action premised on board members' actions that are allegedly still occurring, we address that claim separately.

We have held that when bringing a § 1983 claim, a plaintiff must satisfy two requirements. GJR Investments, Inc. v. County of Escambia, Florida, 132 F.3d 1359, 1367 (11th Cir. 1998). First, the plaintiff must state a constitutional claim. Second, the plaintiff must satisfy a heightened pleading requirement. Id. Because the remaining Appellants fail to allege sufficiently relevant facts to support their claims that the board is still applying the ninety percent policy to them and that the retroactive application of the ninety percent policy to them increased their punishment in violation their constitutional right against *ex post facto* laws, the district court properly granted the board members' motion to dismiss.

In GJR Investments, Inc. v. County of Escambia, Florida we addressed pleading requirements for § 1983 claims. 132 F.3d 1359 (11th Cir. 1998). There we held:

> [W]hile Fed.R.Civ.P.8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim. Some factual detail in the pleadings is necessary to the adjudication of § 1983 claims. This is particularly true in cases involving qualified immunity, where we must determine whether a defendant's actions violated a clearly established right.

Id. at 1367 (internal citations omitted). Vague and conclusory allegations subject a claim to dismissal. Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984).

The district court did not err in concluding that the remaining Appellants have failed to sufficiently allege an *ex post facto* violation. Here, they did not allege relevant facts such as the nature and date of each Appellants' offense, the sentence imposed, the tentative parole month as calculated with and without regard to the ninety percent policy, or any factors bearing on the likelihood of parole success to support their allegations. Accordingly, the order of the district court is

AFFIRMED.

FILED IN CLERK'S
OFFICE
U.S. D.C. Atlanta
AUG 21 2003
Clerk
By: Deputy Clerk.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COLEMAN JACKSON,	
Plaintiff,	
v.	CIVIL ACTION FILE NO. 1:02-CV-3176-WBH
WALTER RAY, et al.,	
Defendants.	

ORDER

Before the Court is Defendants' Motion to Dismiss [4]; Defendants' Motion to Transfer Case [7];[1] Defendants' Motion to File Excess Pages [12]; Defendants' Motion for Sanctions [13]; Plaintiff's Motion for Class Certification [16]; Defendants' Motion to Extend Time to Respond [21]; Defendants' Motion to Dismiss Amended Complaint [23];

[1] Since filing the motion to transfer, Plaintiff filed an amended complaint which prompted Defendants to abandon their arguments in support of transfer. Accordingly, the motion is DENIED AS MOOT.

Plaintiff's Motion for Equitable Relief and Expedited Hearing [27-1, 27-2]; Movant Williams' Motion to Join as Plaintiff [30]; Movant Hill's Motion to Join as Plaintiff [41]; Movant Bowen's Motion to Join as Plaintiff [45]; Movant Walker's Motion to Join as Plaintiff [47]; Movant Godby's Motion to Join as Plaintiff [52]; Defendants' Motion to Stay Proceedings [53-2]; Plaintiff's Motion to Consolidate [57]; and Movant Patterson's Motion to Join as Plaintiff [64].

BACKGROUND

Plaintiff, formerly incarcerated by the Georgia Department of Corrections, brought this putative Section 1983 class action against Defendants in their individual capacities on behalf of himself and all present and former inmates similarly situated. Plaintiff claims that Defendants, members of the State Board of Pardons and Paroles ("the Board"), violated his constitutional right against ex post facto laws. On August 4, 1999, Plaintiff was convicted in Fulton County Superior Court of an aggravated assault committed on August 25, 1996, and he was sentenced to twenty years of imprisonment with five years to serve in prison and fifteen years of probation. Under the rules in effect at the time Plaintiff committed the crime, prisoners convicted of aggravated assault were required to serve a minimum of one-third of their prison term before becoming eligible for an initial parole hearing. See O.C.G.A. §42-9-45(f).

On December 9, 1997, the Board adopted a new policy ("the 90 percent policy") which required prisoners convicted of twenty offenses, including aggravated assault, to serve 90 percent of their prison term before becoming eligible for a parole hearing. The Board applied the 90 percent policy retroactively by applying it to convictions entered on or after January 1, 1998, even if the underlying

criminal conduct occurred before January 1, 1998. On October 2, 2000, the Board informed Plaintiff that he would tentatively be entitled to his first parole eligibility hearing in June 2003. Based on the guidelines in effect when he committed the assault, Plaintiff expected an initial parole eligibility hearing in August 2000. When Plaintiff requested reconsideration of his parole eligibility, the Board cited the 90 percent policy in denying his request. Plaintiff was also unsuccessful in challenging the Board's determination before Georgia's Superior Courts Sentence Review Panel.

On April 25, 2001, Plaintiff filed a joint motion for a writ of habeas corpus and a complaint for damages and equitable relief against the Board pursuant to 42 U.S.C. § 1983. Plaintiff alleged that the Board retroactively increased his punishment in violation of the Ex Post Facto Clause of the United States Constitution by applying the 90 percent policy to him. See Jackson v. State Board of Pardons and Paroles, et al., 2:01-CV-068-WCO (N.D. Ga.). On May 30, 2002, after conducting an evidentiary hearing, Judge O'Kelley determined that the Board's retroactive enforcement of the 90 percent policy against Plaintiff was unconstitutional, and the Board was enjoined from enforcing the policy against Plaintiff. The Board was ordered to provide Plaintiff with an initial parole eligibility hearing within forty-five days. The Board complied, and Plaintiff was released on parole on July 17, 2002.

On September 9, 2002, the Board, by resolution amendment, amended its parole decision guidelines to provide that the 90 percent policy would only be applied to those offenders who committed their crimes on or after January 1, 1998. The Board acknowledged that a federal court had found the 90 percent policy to be unconstitutional when applied to an offender who committed his or her offense prior to the effective date of the policy. The Board

also stated that it would reconsider those prisoners who had been considered under the 90 percent policy despite the fact that their offenses were committed before January 1, 1998.

Plaintiff filed this putative class action on November 22, 2002, seeking damages for unlawful imprisonment as a result of the individual Defendants' application of the 90 percent policy in violation of the ex post facto prohibitions of the Untied States and Georgia Constitutions, and unspecified state and federal laws. On February 4, 2003, Plaintiff filed an amended complaint adding the following plaintiffs: Thomas A. Cleveland, Larry Cummings, Jr., Steven Craig Sterling, Franklyn H. Francis, and Kenneth A. Wallace. The amended complaint, which also seeks injunctive relief for the additional plaintiffs, alleges that Defendants failed to reconsider Cleveland and Cummings for parole and continued to apply the 90 percent policy to them. The amended complaint further alleges that Defendants reconsidered the parole dates of Sterling, Francis, and Wallace in bad faith, applying a de facto 90 percent policy to them.

DISCUSSION

I. Rule 12(b) (6) Standard

A district court may dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991). In evaluating a motion to dismiss for failure to state a claim, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. Peterson v. Atlanta Housing Auth., 998 F.2d 904, 912 (11th Cir. 1993). While the Court must

weigh every inference in the plaintiff's favor, however, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgmt v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002). The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Quality Foods de Centro America, S.A. v. Latin America Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983). Thus, a court can dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) only when a plaintiff "can prove no set of facts which would entitle him to relief." Martinez v. American Airlines, Inc., 74 F.3d 247, 248 (11th Cir. 1996).

II. Motions to Dismiss

Defendants have filed motions to dismiss both the original complaint and the amended complaint on the following grounds: (1) Plaintiff Jackson's claim is barred by the doctrine of res judicata and the statute of limitations; (2) the additional Plaintiffs' claims are barred by the statute of limitations; (3) Plaintiffs cannot state a claim under the Ex Post Facto Clause or Georgia law; (4) Defendants are entitled to qualified immunity; (5) Plaintiffs' claims for injunctive relief are moot; and (6) the additional Plaintiffs' claims are barred by the Prison Litigation Reform Act ("PLRA").[2] The Court will discuss those grounds it has found dispositive below.

A. Statute of Limitations

1. Plaintiff Jackson

[2] Relying largely on these same grounds, Defendants have also moved for Rule 11 sanctions for the filing of a frivolous lawsuit. The Court finds that the award of such sanctions in this case is unwarranted. Accordingly, Defendants' motion [13] is DENIED.

Defendants assert that Plaintiff Jackson's claim should be dismissed because it is barred by the statute of limitations. Georgia's two-year statute of limitations for personal injury actions applies to this Section 1983 action. See Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003). As a general matter, the statute of limitations begins to run when "the facts which support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Brown v. Georgia Board of Pardons & Paroles, 2003 U.S. App. LEXIS 13589, *6 (11th Cir. May 22, 2003) (citing Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996)). Defendants claim that the statute began to run on October 2, 2000, when the Board advised Plaintiff of his tentative parole month under the 90 percent policy. Jackson filed this action on November 22, 2002, more than two years after receiving such notice.

Jackson claims that he did not suffer any injury until the date that the Board should have considered him for parole under the guidelines in effect when he committed the assault. The Court disagrees. Upon learning that the Board had applied the 90 percent policy to his offense in October 2000, Jackson knew, or should have known, all of the facts necessary to pursue his Ex Post Facto claims. See Brown, 2003 U.S. App. LEXIS at *7 (holding that a prisoner who asserted an ex post facto claim was injured, if at all, when the Board first informed him of the retroactive application of its new parole reconsideration policy); Franklin v. Ray, No. 02-12720, slip op. at 10 (11th Cir. Oct. 9, 2002) (unpublished) (holding that the statute of limitations on the prisoner's ex post facto claim began to run when the prisoner was first advised of his next parole review date under the Board's new parole eligibility policy). In this case, Jackson actually initiated several challenges to the 90 percent policy when he learned that it had been applied to his case.

Jackson also argues that his claim is not time-barred under the continuing violations doctrine. Specifically, Jackson contends that his rights were violated each day that the Board refused to grant him parole consideration after the date that he would have been eligible under the guidelines in effect when he committed his offense. "The critical distinction in the continuing violation analysis is whether the plaintiff complains of the present consequence of a one time violation, which does not extend the limitations period, or the continuation of that violation into the present, which does." Lovett, 327 F.3d at 1183 (internal marks and citations omitted). The Eleventh Circuit has held that the Board does not engage in continuing violations each time it fails to review a prisoner for parole eligibility. See Brown, 2003 U.S. App. LEXIS at *5 (holding that the Board's decision to schedule a parole hearing in accordance with a new policy, different from the one in place when the prisoner was convicted, does not fall under the continuing violation doctrine); Lovett, 327 F.3d at 1183 (holding that the Board's decision not to reconsider the prisoner for parole was a one time act with continued sequences).

Following this reasoning, the Court concludes that the Board did not engage in continuing violations each day it failed to consider Jackson for parole.[3] Accordingly, Defendants' motion to dismiss Jackson's claim as time-barred is GRANTED.

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[3] The Court disagrees with Jackson that the doctrine of equitable tolling applies in this case. Jackson relies on Eleventh Circuit dicta suggesting that the statute might be equitably tolled when a prisoner's claim is barred by the PLRA's administrative exhaustion requirement while he is imprisoned and barred by the statute of limitations after his release. See Napier v. Preslicka, 314 F.3d 528, 534 n.3 (11th Cir. 2002). Assuming, arguendo, that the PLRA applies, Jackson was released from prison on July 17, 2002, more than two months before the limitations period expired.

2. Additional Plaintiffs

Defendants assert that the additional Plaintiffs' claims should be dismissed because they are also barred by the two-year statute of limitations. Specifically, Defendants contend that their claims should have been filed within two years of receiving notice that they would be considered for parole under the Board's 90 percent policy. Plaintiffs argue that their claims did not accrue until their demands for reconsideration were denied by the Board, and the violation of their rights continues each day that they are denied parole consideration. While the Court disagrees with Plaintiff's argument for the reasons discussed above, it cannot presently determine the relevant limitations period for any of the additional Plaintiffs.

While the amended complaint alleges that the additional Plaintiffs committed their offenses before January 1, 1998, it does not set forth any other dates relevant to determining when the statute of limitations began to run. Notably, it is not clear when any of the additional Plaintiffs began serving their sentences, or when the Board advised them of their eligibility for parole consideration under the 90 percent policy.[4] When the running of the statute of limitations cannot be determined from the face of the complaint, the claim is not subject to dismissal under Rule 12(b)(6). See Avco Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982) (noting that a motion for summary judgment is the proper procedure). Therefore,

[4] In their unauthorized response to Defendants' reply brief, Plaintiffs set forth additional information about their tentative parole months as calculated before and after the Board's resolution amendment. Because these dates are not alleged or even referenced in the amended complaint, the Court has not considered this information in the context of Defendants' motion to dismiss.

Defendants' motion to dismiss the additional Plaintiffs' claims as time-barred is DENIED.

B. Ex Post Facto Claim

Defendants contend that Plaintiffs' complaint should be dismissed because, as a general matter, the Board's 90 percent policy does not violate the Ex Post Facto Clause. Even assuming that Plaintiffs' allegations establish such a violation, Defendants assert that they are entitled to qualified immunity because they did not have fair warning that the retroactive enforcement of the policy amounted to a constitutional violation.

As the Supreme Court has recognized, retroactive changes in parole laws may, in some instances, violate the Ex Post Facto Clause. See Garner v. Jones, 529 U.S. 244, 249-50 (2000). However, there is no "single formula" for determining whether a particular parole policy violates the Ex Post Facto Clause. Id. at 252. Rather, the court must conduct a particularized inquiry into whether a prisoner has demonstrated that the retroactive application of the policy to this own sentence created a significant risk of increasing his punishment. Id. at 255. See also Jackson v. State Board of Pardons and Paroles, et al., 2:01-CV-068-WCO (N.D. Ga.) (considering such case specific information as Plaintiff Jackson's crime severity level, parole success factors, total parole success likelihood score, and guidelines grid score).

It is well established in the Eleventh Circuit that Section 1983 cases are subject to heightened pleading requirements, especially where, as here, the defense of qualified immunity has been asserted. See Dalrymple v. Reno, 2003 U.S. App. LEXIS 12475 at *13 (11th Cir. June 19, 2003). The complaint must allege the relevant facts with some specificity; vague and conclusory allegations subject a

complaint to dismissal. Id.; Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984). In their amended complaint, Plaintiffs collectively allege that the retroactive application of the 90 percent policy to their cases increased their punishment in violation of the Ex Post Facto Clause. However, Plaintiffs have not alleged the relevant facts to support these allegations, such as the nature and date of each Plaintiffs' offense, the sentence imposed, the tentative parole month as calculated with and without regard to the 90 percent policy, or any factors bearing on the likelihood of parole success.[5] Consequently, the Court concludes that Plaintiffs have failed to sufficiently allege their Ex Post Facto Clause claims. Defendants' motion to dismiss these claims is GRANTED.

C. State Law Claims

Defendants contend that any state law claims asserted by Plaintiffs should be dismissed for failure to state a claim. It does not appear from the amended complaint or Plaintiffs' briefs that Plaintiffs have asserted any independent claims under Georgia law. Furthermore, as Plaintiffs appear to acknowledge, their Section 1983 claim must be based on the deprivation of a right secured by the Untied States Constitution or federal law. See Burton v. City of Belle Glade, 178 F.3d 1175, 1178 (11th Cir. 1999). While Plaintiffs may argue that state laws were violated when the Board adopted and applied the 90 percent policy, these claims are not actionable under Section 1983. Accordingly, Defendants' motion to dismiss the state law claims, to the extent Plaintiffs have asserted any, is GRANTED.

CONCLUSION

[5] The Court notes that although some of the plaintiffs are presently incarcerated, they are not proceeding pro se in this matter and were represented by counsel when the amended complaint was filed.

For the reasons stated above, Defendants' Motions to Dismiss [4, 23] are GRANTED; Defendants' Motion to Transfer Case [7] is DENIED AS MOOT; Defendants' Motion to File Excess Pages [12] is summarily GRANTED; Defendants' Motion for Sanctions [13] is DENIED; Plaintiff's Motion for Class Certification [16] is DENIED AS MOOT; Defendants' Motion to Extend Time to Respond [21] is DENIED AS MOOT; Plaintiff's Motion for Equitable Relief and Expedited Hearing [27-1, 27-2] is DENIED AS MOOT; Movant Williams' Motion to Join as Plaintiff [30] is DENIED AS MOOT; Movant Hill's Motion to Join as Plaintiff [41] is DENIED AS MOOT; Movant Bowen's Motion to Join as Plaintiff [45] is DENIED AS MOOT; Movant Walker's Motion to Join as Plaintiff [47] is DENIED AS MOOT; Movant Godby's Motion to Join as Plaintiff [52] is DENIED AS MOOT; Defendants' Motion to Stay Proceedings [53-2] is summarily DENIED; Plaintiff's Motion to Consolidate [57] is DENIED AS MOOT; and Movant Patterson's Motion to Join as Plaintiff [64] is DENIED AS MOOT. The Clerk is DIRECTED to terminate all pending submissions and CLOSE this case.

It is so ORDERED this 21st day of August, 2003.

s/Willis B. Hunt
Willis B. Hunt, Jr.
Judge, United States District Court

FILED IN CLERK'S OFFICE
U.S.D.C. – Gainesville
MAY 30, 2002
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

COLEMAN JACKSON,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL NO.
	:	2:01-CV-068-WCO.
STATE BOARD OF PARDONS &	:	
PAROLES; DEPARTMENT OF	:	
OFFENDER REHABILITATION	:	
OF THE STATE OF GEORGIA,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of plaintiff's motion for equitable judgment [7-1].

I. Background

Plaintiff is currently confined at the Hall County Correctional Institute pursuant to an August 4, 1999 conviction for aggravated assault in the Superior Court of Fulton County, Georgia. See State v. Jackson, No. Z85142 (Ga.Super. Ct. filed Dec. 20, 1996). Based upon a grand jury indictment charging him with "unlawfully commit[ting] an assault upon the person of Shirley Ann Welch, by shooting at, toward, and in her direction with a pistol, and by striking

and beating her with a pistol," the court sentenced plaintiff to confinement for a period of twenty years, with five years to serve (Pl.'s Ex. 5 at 33; Def.'s Ex. 4 at 2).[1] Plaintiff did not appeal his conviction or sentence.

As of August 25, 1996, the date of plaintiff's offense, the Georgia General Assembly required prisoners convicted of aggravated assault to serve a minimum of "one-third of the prison term imposed by the sentencing court" before becoming eligible for an initial parole hearing before the State Board of Pardons & Paroles ("the Board"). O.C.G.A. § 42-9-45(f) (2002). Nevertheless, on December 9, 1997, the Board adopted a resolution amending its statutory guidelines "to provide that any offender who is convicted on or after January 1, 1998, of one or more of [twenty enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison" (Pl.'s Ex. 1 at 1; Def.'s Ex. 2 at 2 ("90% time-served policy")). The Board's new 90% time-served policy thus increased the minimum number of months-to-serve for certain offenses, including plaintiff's, postponing the date of the earliest possible parole eligibility hearing until service of 90%, rather than one-third, of the inmate's prison sentence. Further, the Board applied its new policy retroactively; the policy applied to all covered convictions entered on or after January 1, 1998 even though, in many cases, the underlying criminal conduct had taken place prior to that date.

On October 2, 2000, the Board informed plaintiff that his recommended tentative parole month ("TPM"), the date upon which he would tentatively be entitled to his first parole eligibility hearing, had been scheduled for June of

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[1] Unless otherwise indicated, "Ex." refers to exhibits admitted at the evidentiary hearing held in connection with this matter on April 10, 2002.

2003 (Pl.'s Ex. 5 at 18; Def .'s Ex. 5). Plaintiff challenged his TPM by letter of October 24, 2000, requesting that the Board re-evaluate his parole eligibility (Pl.'s Ex. 5 at 16; Def.'s Ex. 3 at 16). In response, the Board informed plaintiff that, pursuant to its newly adopted 90% time-served policy, plaintiff "must serve 90% or 54 months of his sentence before any parole," and that "the Parole Board [would] not reconsider its decision...." (Pl.'s Ex. 5 at 13; Def.'s Ex. 3 at 13).

Consequently, plaintiff renewed his request for reconsideration by the Board, while also challenging his TPM before Georgia's Superior Courts Sentence Review Panel (Pl.'s Ex. 5 at 10, 12; Def.'s Ex. 3 at 10, 12). In both instances, plaintiff argued that the Board's decision to apply its 90% time-served policy to his offense retroactively increased the punishment inflicted upon him by the State of Georgia, in violation of the Ex Post Facto Clause of the United States Constitution. See U.S. Const. Art. I, § 10, cl. 1. Plaintiff's requests were subsequently denied on February 23, 2001 and March 27, 2001, respectively (Pl.'s Mot. for Equitable J., Ex. 4; Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8). In its March 27, 2001 letter to plaintiff, the Board observed that "[m]any inmates whose offenses were committed prior to January 1, 1998, but were convicted after January 1, 1998, as was [plaintiff], have been considered under the Board's 90% policy ... The Board is unwilling to deviate from the manner in which this policy has been adopted and implemented" (Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8).

Thereafter, on April 25, 2001, plaintiff filed a joint motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a complaint for damages pursuant to 28 U.S.C. § 1983[1-1], re-asserting his Ex Post Facto Clause challenge in this court. United States Magistrate Judge John R. Strother, Jr. subsequently issued a report and recommendation ("R & R") [6-1] recommending that plaintiff's § 2241 petition be dismissed without prejudice for failure to exhaust his

available state remedies, see 28 U.S.C. § 2254(b)(1) (2001); that Georgia's Eleventh Amendment immunity warranted the dismissal of plaintiff's § 1983 claims for money damages, see U.S. Const. amend. XI; Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); and that plaintiff's § 1983 Ex Post Facto claim otherwise be permitted to proceed.

Over plaintiff's objections [7-1], the court adopted Judge Strother's R & R as the order of this court on March 7, 2002[8-1]. Yet, the court was unable to resolve plaintiff's motion for equitable judgment respecting plaintiff's surviving § 1983 claim [7-1], a motion that plaintiff had haphazardly incorporated into his objections to the magistrate's R & R. Specifically, the court noted that plaintiff's motion for equitable judgment, in which he sought to enjoin the Board's enforcement of the 90% time-served policy against him, was not in proper form. Plaintiff had failed to attach any affidavits in support of his factual contentions, in violation of Local Rule 7.1, see L.R. 7.1, NDGa., and plaintiff's factual allegations were insufficiently developed to properly adjudicate the motion. Nevertheless, the court determined that on its face, "[the Board]'s retroactive application of its 90% time-served policy to [plaintiff] [was] constitutionally suspect" (Order at 10). Accordingly, the court set the matter for an evidentiary hearing on April 10, 2002[9-1], at which time the Board was ordered to show cause, if any, why plaintiff's motion for equitable judgment should not be granted.

II. The April 10, 2002 Hearing

At the April 10, 2002 hearing, the Board offered testimony from Ms. Tracy D. Masters ("Masters"), Director of the Board's Legal Services Division; Mr. Michael P. Sullivan ("Sullivan"), Director of the Board's Clemency Administration & Parole Selection Division; and Mr. Steve Baustin ("Baustin"), an Officer in the Board's Hearing Examiner Unit for Parole Decision Guidelines.

Baustin is one of ten hearing examiners responsible for the calculation of parole eligibility data and a TPM date for each inmate, which is then submitted to the Board for review. The Board thereafter votes to accept or reject the hearing examiner's recommendation. Although Baustin did not personally conduct the initial "months-to-serve" calculation respecting plaintiff's parole eligibility, he briefly outlined the standard procedure each examiner employs:

A. The Initial TPM Recommendation

First, the examiner identifies the inmate's "Crime Severity Level" on a table of offenses listed from least severe ("Level I") to most severe ("Level VII") (Pl.'s Ex. 4 at 2 ("Crime Severity Levels")). The table classifies aggravated assault as a "Level V" offense. Next, the hearing examiner calculates the inmate's "Total Parole Success Likelihood Score" on a "Parole Decision Guidelines" chart (Pl.'s Ex. 5 at 18; Def.'s Ex. 5; Def.'s Ex. 6). This score represents the sum of eight numerical "Parole Success Factors," historically-based data such as the inmate's number of prior convictions, previous parole or probation violations, and history of drug use. Based upon plaintiff's criminal and social history, plaintiff received a Total Parole Success Likelihood Score of 14.

Once the hearing examiner calculates the Crime Severity Level and Total Parole Success Likelihood Score, the examiner uses the two figures to identify the recommended number of "months-to-serve" on a Parole Decision Guidelines Grid (Pl.'s Ex. 4 ("Guidelines Grid")). For a "Level V" offense with a Parole Success Likelihood Score of 14, the Guidelines Grid recommends that the inmate serve 34 months before being eligible for parole. Notably, the Guidelines Grid describes Parole Success Likelihood Scores in the 14-20 point range as "EXCELLENT."

The hearing examiner then calculates the inmate's TPM based upon the recommended months-to-serve from the Guidelines Grid. In plaintiff's case, for example, the 34 months-to-serve calculation would have generated a recommended TPM of October 2001. Yet, hearing officers cannot submit a TPM to the Board without also considering the minimum parole eligibility requirements: (1) the one-third time-served requirement under O.C.G.A. § 42-9-45(f); and (2) the 90% time-served policy. Further, according to Sullivan, the Director of the Board's Clemency Administration & Parole Selection Division, hearing examiners are instructed to recommend the lengthiest number of months-to-serve to the Board. Thus, as Baustin testified, the TPM date that the hearing examiner recommends to the Board will represent the greater of either (1) the inmate's Guidelines Grid score; or (2) 90% of the inmate's court-imposed prison sentence, if applicable to his offense.

Given his lack of involvement in plaintiff's initial TPM calculation, Baustin could only speculate as to why the Board assigned plaintiff a TPM of June 2003 instead of October 2001, the Guidelines Grid recommendation. He admitted, however, that the hearing examiner's application of the 90% time-served policy was the most likely explanation for the approximately 20-month disparity.

B. The Board's Discretion

Sullivan observed that, aside from the statutory minimum threshold set forth under O.C.G.A. § 42-9-45(f), the Board is not bound by the 90% time-served policy, the hearing examiner's TPM recommendation, or any other calculations made by the hearing examiner. In fact, Sullivan asserted, in making his recommendation, the hearing examiner is "just doing math for the Board." He further testified that nothing prevents the Board from exercising its discretion, and that, in hundreds of cases, the Board has

actually departed upward from the recommended TPM date resulting from the application of the 90% time-served policy. Additionally, Sullivan noted that even after the Board votes to approve a particular TPM date, the Board retains discretion to modify that date at any time, which it often does.

Masters, the Board's Director of Legal Services, likewise testified that the 90% policy is merely a "policy" that lacks the effect of law. Rather, she contended, the 90% time-served policy may be modified by the Board at any time, via a majority vote of its members. Masters argued that in enacting the policy, the Board simply wished to promulgate the manner in which it planned to exercise its discretion. The Board hoped to inform attorneys, judges, and criminal defendants of its intentions, and to dispel public misconceptions about Georgia's pardon and parole system.

Similarly, Baustin observed that the 90% time-served policy is "just another factor" the Board considers in making parole decisions. He noted that, irrespective of the hearing examiner's recommendation, the Board makes an individualized determination in each case.

On the other hand, on cross-examination, plaintiff elicited testimony from Sullivan indicating that, out of over 8,000 cases, the Board deviated downward from the 90% time-served policy only 10 or 11 times. Further, the Board apparently deviated downward in those 10 or 11 cases because of extraordinary circumstances (i.e., where the inmates at issue had rendered substantial assistance to prosecutors). Although Masters had similarly contended that the Board's broad discretion vitiated the importance of the 90% time-served policy, she admitted on cross examination that the Board follows the hearing examiner's TPM recommendation "all the time," perhaps in as many as 80% of the cases the Board reviews.

C. Reconsideration of the Board's TPM Notice

After the Board votes to accept or deny the TPM recommendation submitted by the hearing examiner, the Board notifies the inmate of its decision via a "Parole Decision Guidelines--Notice of Tentative Action" (Parole Decision Guidelines). Said notice includes, inter alia, the Board's TPM recommendation, the months-to-serve calculation generated from the Guidelines Grid, and the cumulative Parole Success Likelihood Score. Further, the notice indicates that "[a]ll decisions made by the Board are tentative and may be changed at the discretion of the Board at any time." At this point, the inmate may request that the Board reconsider his recommended TPM date.

Baustin, who personally reviewed plaintiff's reques for reconsideration, testified that in his 23 years of employment with the Board, he has reviewed approximately 1,200 TPM "appeals" per year. Further, Baustin indicated that he has deviated from the Board's TPM decision, and recommended a different TPM, in approximately 20% of those cases. Baustin was unable to determine whether the TPM deviations within that 20% reflected months-to-serve increases, or months- to-serve decreases, but he reiterated that the Board ultimately has discretion to adjust the recommended TPM date in either direction.

When asked by the court whether, on reconsideration, the hearing examiner was authorized to deviate from the Guidelines Grid calculations, Baustin explained that the hearing examiner may include "comments" with his recommendation (Def.'s Ex. 6). Baustin noted that the hearing examiner's TPM recommendation is not always "strictly by the grid," but that all of the pertinent Guidelines Grid figures are provided to the Board for review. Further, Baustin testified that the hearing examiner may include a "policy" recommendation in his submission to the Board.

On the other hand, Baustin's testimony also disclosed that the TPM "appeal" process is somewhat of a misnomer. In practice, the hearing examiner who reviews the inmate's request for reconsideration will not re-calculate the inmate's TPM, re-submit the inmate's parole eligibility data to the Board, or otherwise adjust the inmate's TPM date in any way absent a mathematical error warranting reconsideration. The "reconsideration" process may thus be more accurately described as a request for a TPM "recomputation." Moreover, Baustin asserted that the initial hearing examiner's application of the 90% time-served policy to calculate an inmate's TPM date, and the Board's subsequent acceptance of the examiner's recommendation, is not the sort of "error" warranting recomputation. Rather, according to Baustin, requests for reconsideration filed on this basis are summarily denied by the hearing examiners, ending the review process.

The typical errors Baustin encounters pertain to miscalculated Crime Severity Levels and Parole Success Likelihood Scores, and erroneous applications of the Board's 90% time-served policy (i.e., where the inmate's underlying offense does not fall within the group of offenses covered under the policy). Baustin discovers such errors in approximately 10% of the 30 requests for reconsideration he reviews each week. Even where computation errors are discovered, however, the hearing examiner will not re-submit a case to the Board for reconsideration if the case falls under the 90% time-served policy.[2]

Finally, with respect to plaintiff's requests for reconsideration, Baustin observed that he personally denied

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[2] Presumably, Baustin meant that such reconsideration would not take place, as a general rule, because the TPM date generated by the 90% time-served policy typically exceeds the Guidelines Grid recommendation.

plaintiff's requests on January 18, 2001 and February 17, 2001. Baustin asserted that, the Board having accepted the initial hearing examiner's 90% time-served recommendation, he saw no reason to depart from the TPM date at issue. Rather, Baustin testified, the Board would not likely have reconsidered its decision anyway. Baustin noted that although the Board has not made any official declaration to him indicating that the application of the 90% time-served policy is mandatory, the Board has "made it clear that ... [it] would not reconsider the 90% policy" in the TPM "appeal" context.

D. Plaintiff's Parole Success Likelihood

As to the likelihood that plaintiff would have received an earlier TPM but for the Board's application of the 90% time-served policy to his offense, Masters indicated that, in her opinion, such a result was unlikely. Rather, she testified that plaintiff's sentence was unusually short in proportion to the severity of his offense, that the recommendations generated from the Guidelines Grid do not bind the Board, and that irrespective of the adoption of the challenged policy, the Board could have required plaintiff to "max out," or serve his entire 5-year term of incarceration. In Masters' opinion, plaintiff's court-imposed prison sentence was unusually short in relation to similar offenses because the sentencing judge was probably aware of the Board's 90% time-served policy and considered the policy in rendering his sentence.

Utilizing incarceration data for aggravated assault offenders in the Georgia prison system, Sullivan also testified that, in his opinion, plaintiff's sentence was lighter than one might expect given the victim's injuries, plaintiff's use of a weapon, his prior criminal record, and his flight from the police (Def.'s Ex. 12). Further, Sullivan's testimony indicated that the average periods of incarceration imposed by the State of Georgia upon relevant aggravated assault

offenders decreased slightly from 1996 (6.5 years imposed) through 2000 (5.9 years imposed), while the average time-served for such offenders increased slightly during the same period (from 2.9 years served in 1996 to 3.2 years served in 2000) (Def.'s Ex. 12). Thus, these statistics arguably corroborated Masters' contention that plaintiff received a lighter sentence because of the Superior Court's awareness of the 90% time-served policy. Yet, Sullivan also acknowledged that plaintiff received the maximum statutory sentence of 20 years, with 5 years to serve, and that plaintiff's "good work history" would have been considered at sentencing.

III. Plaintiff's Motion for Equitable Judgment

A. 42 U.S.C. § 1983

To articulate a cognizable claim under 42 U.S.C. § 1983, "plaintiff must show that a person, acting under color of any statute, ordinance, regulation, custom, or usage, deprived him of a right, privilege, or immunity secured by the Constitution." Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F.Supp.2d 1320, 1328 (N.D.Ga.2000). Plaintiff's § 1983 claim is rooted in the Board's alleged violation of plaintiff's rights under the Ex Post Facto Clause of the United States Constitution [1-1]. See U.S. Const. Art. I, § 10, cl. 1. The alleged violation stems from the Board's retroactive enforcement of its 90% time-served policy against plaintiff, thus the Board may fairly be characterized as "acting under color" of state law within the meaning of § 1983. 42 U.S.C. § 1983.

B. Analysis of Plaintiff's Ex Post Facto Claim

1. Ex Post Facto Standard

To prove that a retroactively applicable parole board procedure violates the Ex Post Facto Clause, a prisoner must

show that the challenged action "creates a significant risk of prolonging [his] incarceration." Garner v. Jones, 529 U.S. 244, 251 (2000). In two recent opinions, one of which originated in this very district, the United States Supreme Court suggested that a retroactive amendment postponing a prisoner's initial parole eligibility date would offend the constitutional ban on Ex Post Facto legislation. See Garner, 529 U.S. at 250-51 (2000); California Dep't of Corrections v. Morales, 514 U.S. 499, 511 (1995). Additionally, nearly thirty years ago the Supreme Court observed that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the Ex Post Facto clause [citations omitted] of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (emphasis added) (quoting Rooney v. North Dakota, 196 U.S. 319, 325 (1905)). That same Supreme Court cited, with apparent approval, a decision of the United States Court of Appeals for the Ninth Circuit holding that "[u]nder California law, a convicted person's eligibility for parole consideration (as opposed to parole) is part of the 'law annexed to the crime when committed' ... and any legislative change in such eligibility which would work to a prisoner's disadvantage may not be retroactively applied." Love v. Fitzharris, 460 F.2d 382, 383 (9th Cir.1972), vacated on other grounds, 409 U.S. 1100 (1973). See also Akins v. Snow, 922 F.2d 1558, 1563 (11th Cir.1991), cert. denied, 501 U.S. 1260 (1991) (opining that the Ex Post Facto Clause "applies to a change in parole eligibility" because "parole eligibility must be considered part of any sentence....").

Nevertheless, the Supreme Court has declared that there is no "simple formula" for determining whether official rules or procedures violate the Ex Post Facto Clause. Garner, 529 U.S. at 252. Rather, in the pardons and paroles context, the inquiry ultimately boils down to whether, in light of all of the relevant facts and circumstances, the prisoner can

show "through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than [he would have received] under the earlier rule." Id. at 255. To make such a showing, the inmate need not prove "that he definitely would have served a lesser sentence under the previous legal regime," Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, 1149 (11th Cir.1995) (emphasis omitted) (citing Miller v. Florida, 482 U.S. 423, 432 (1987)), only that the challenged procedure creates a "sufficient risk" of doing so. Morales, 514 U.S. at 509.

To inform this analysis, courts should examine the parole board's internal policy statements, for "[a]t a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether ... the amendment [at issue] ... create[s] a significant risk of increased punishment." Garner, 529 U.S. at 256. Further, such "policies and practices will indicate the manner in which [the Board] is exercising its discretion." Id.

Ex Post Facto Clause analysis also requires courts to gauge the level of discretion actually exercised by the parole board in question. For example, both Garner v. Jones, 529 U.S. 244, and Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, involved ex post facto challenges to certain parole eligibility procedures that were retroactively enforced by Georgia's State Board of Pardons & Paroles, the defendant in the instant litigation. The Garner court examined a Board rule that retroactively decreased the frequency, from three years to eight years, with which prisoners serving life sentences would be granted parole reconsideration hearings after an initial denial. See Garner, 529 U.S. at 247. In Jones, a Georgia inmate sought to enjoin the enforcement of a Board rule that retroactively required "Level V" offenders to serve the greater of either (1) the

recommended months-to-serve from the Guidelines Grid; or (2) one-third of the court-imposed sentence of incarceration, before being eligible for parole. 59 F.3d at 1148. Previously, only the more serious "Level VI" and "Level VII" offenders were subject to the one-third time-served requirement; "the TPM of prisoners with [Crime Severity Levels] of I through V was determined, prior to any discretionary departure, solely by reference to the [Guidelines Grid]." Id. at 1147.

Although the United States Court of Appeals for the Eleventh Circuit had found, in Garner, that the challenged rule violated ex post facto, the Supreme Court ultimately reversed and remanded for further findings on grounds that the Eleventh Circuit failed to evaluate whether the rule actually posed a sufficient risk of increasing the inmate's punishment. See Garner 529 U.S. at 255. Specifically, the Supreme Court could not determine, from the record before it, whether the Board's discretion to grant a parole reconsideration hearing during the eight-year interval in which no hearing was due, or the Board's discretion to grant expedited reconsideration hearings in the event of a change in circumstances, vitiated the underlying ex post facto concerns. See id.

Likewise, the "undisputed fact" that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM" was the key to the Eleventh Circuit's decision in Jones. 59 F.3d at 1149. Affirming the district court's conclusion that the Board's retroactive extension of the one-third time-served requirement to Level V offenders did not violate the Ex Post Facto Clause, the Eleventh Circuit opined that "the degree of the Board's continuing parole discretion implies that the TPM rule change 'create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes....'" Id. (quoting Morales, 514 U.S. at 500).

Finally, several federal decisions suggest that a challenged parole eligibility method, policy, or procedure need not necessarily take the form of a law, rule, or regulation to implicate the Ex Post Facto Clause. See, e.g., Garner, 529 U.S. at 255 (opining that ex post facto plaintiff must show that the rule has the effect of retroactively increasing his punishment); United States v. Adeleke, 968 F.2d 1159, 1160 (11th Cir.1992) (opining that the retroactive use of an application note to the federal sentencing guidelines, lacking "the force of law," cannot be deemed to have "changed the law" for ex post facto purposes.); Akins, 922 F.2d at 1561 (11th Cir.1991) (opining that the rules and regulations of the Board, a quasi-legislative entity, implicate ex post facto because they have the force and effect of law); Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir.1984) (opining that the federal parole guidelines lacked "the characteristics of law ... They are not filed and rigid, but are flexible" and, therefore, did not violate the Ex Post Facto Clause); United States ex rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir.1980) (opining that any "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription."); Warren v. Baskerville, 233 F.3d 204, 208 (4th Cir.2000) (opining that a retroactive parole "policy" change "did not for ex post facto purposes have the force and effect of law."); Hill v. Jackson, 64 F.3d 163, 169-70 (4th Cir.1995) (opining that parole reconsideration "policy" did not violate ex post facto because application of the policy was not "automatic," appeals were permitted, and the policy did not affect standards for initial parole consideration); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir.1995) (observing, in dicta, that a retroactively applicable parole policy would constitute a "law" within the meaning of the Ex Post Facto Clause if it "possess[ed] the full force and effect of law...."); Geraghty v. U.S. Parole Commission, 579 F.2d 238, 267 (3d Cir.1978), vacated on other grounds, 445 U.S. 388 (1980) (noting that parole "guidelines" would violate ex

post facto if applied in a fixed and mechanical way); Love, 460 F.2d at 385 (9th Cir.1972) (opining that a parole board's retroactive interpretation of a parole eligibility provision was subject to ex post facto constraints because the interpretation had the effect of law); Oglesby v. Ray, 8 F.Supp.2d 1379, 1380 (N.D.Ga.1998) (Thrash, J .), rev'd on other grounds, 180 F.3d 272 (11th Cir.1999) (applying ex post facto analysis to a retroactive parole board "policy").[3] Rather, as noted, ex post facto considerations apply in the parole eligibility context to any official policy or procedure that has the full force and effect of law, and whose practical implementation produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. Morales, 514 U.S. at 509.

2. Plaintiff's Challenge to the Board's 90% Time-Served Policy

Plaintiff contends that under the guidelines in effect when he committed his crime, he would have been entitled to an initial parole eligibility hearing on or about August 23,

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[3] In Oglesby v. Ray, the district court initially determined that the challenged parole reconsideration "policy" withstood ex post facto scrutiny because it did not create a sufficient risk of retroactively increasing the inmate's punishment. See 8 F.Supp.2d at 1383. The United States Court of Appeals for the Eleventh Circuit subsequently reversed and remanded the case for further consideration in light of its intervening decision in Jones, 59 F.3d 1145. See Oglesby v. Ray, No. 1:97-CV-527-TWT (N.D. Ga. order filed on April 23, 1999 [19-1]). On remand, the district court found the policy violative of the Ex Post Facto Clause [26-1]; however, the Eleventh Circuit once again reversed the ruling in light of the intervening decision of the United States Supreme Court in Garner, 529 U.S. 244 [31-1]. Finally, on November 6, 2001, the district court ultimately dismissed the inmate's action as moot, given the Board's voluntary cessation of the application of the challenged policy [36-1]. Accordingly, the Eleventh Circuit never specifically addressed whether the district court properly treated the challenged "policy" as a "law" for ex post facto purposes.

2000, after having served twenty months of his five-year prison term (Pl.'s Mot. for Equitable J. at 3).[4] But for the Board's retroactive application of its 90% time-served policy to his offense, he argues, the relevant hearing examiner would have recommended a TPM date based upon service of one-third of his court-imposed prison sentence, see O.C.G.A. § 42-9-45(f); the Board would have simply adopted said recommendation as a matter of routine practice; and plaintiff would likely have been paroled on or about the adopted TPM date, given that the Guidelines Grid rated his chance of parole as "excellent." Instead, he claims, the Board rigidly enforced its 90% time-served policy against him, retroactively extending his TPM date from August 23, 2000 to June of 2003, and increasing the length of his confinement by approximately 34 months (Pl.'s Mot. for Equitable J. at 3).

According to the evidence presented at the April 10, 2002 hearing, however, plaintiff's position is not entirely accurate. Rather, the testimony of Sullivan and Baustin established that hearing examiners are instructed to recommend the lengthiest number of months-to-serve under the guidelines. Additionally, the Guidelines Grid indicates that, "[f]or certain Crime Severity Level V, VI, and VII offenses, the Guidelines recommendation will be one-third of the court-imposed sentence length or the grid recommendation, whichever is greater" (Guidelines Grid (emphasis omitted)). Accordingly, even if the 90% time-served policy did not apply to plaintiff's offense, the Board would likely have adopted the 34 months-to-serve recommendation, it being the lengthier of the recommendations generated from the Guidelines Grid (34 months) and the one- third requirement (20 months). Therefore, plaintiff could have at best expected a TPM date of October 2001 (34 months), rather than June 2003 (54

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[4] Plaintiff contends that he is entitled to credit for time served towards his August 4, 1999 sentence (217 days of pre-trial confinement) (Compl.¶ 7).

months).

Nevertheless, the approximately 20-month disparity about which plaintiff complains is not to be taken lightly. If the Board has inflexibly enforced its 90% time-served policy against plaintiff, such that its application has the force and effect of law, then the Board has created a risk of retroactively increasing his punishment. Further, if plaintiff would likely have been paroled sooner than June 2003 but for the Board's allegedly unconstitutional action, then said risk is "sufficient" to render the policy violative of the Ex Post Facto Clause. Morales, 514 U.S. at 509.

After careful review and consideration, the court answers both of these questions in the affirmative. The testimony presented to the court on April 10, 2002 established that although the Board is authorized to exercise discretion, and that the TPM recommendations are merely "recommendations" that remain "tentative" even after the Board votes to accept them, the Board does not in fact exercise any meaningful discretion in cases falling under its 90% time- served policy. Rather, the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates. The statistical evidence, the procedures in effect, the text of the resolution itself, and the Board's internal policy statements and guidelines provide overwhelming evidence, both direct and circumstantial, of this fact.

a. The Practical Implementation of the 90% Policy

The evidence presented at the April 10th hearing indicated that, from January 1, 1998 through June 30, 2001, the Board deviated below the 90% threshold in exactly 10 cases out of 8,664 (Def.'s Ex. 8). Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero. Application of the 90% time-served policy is virtually automatic; the TPM calculation generated by the 90% time- served policy will inevitably reflect the highest number of months-to-serve submitted to the Board, a figure that the Board will always adopt. Thus, the change in the TPM formula at issue in this case is a far cry from the change examined by the Eleventh Circuit in Jones, where the court determined that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM." Jones, 59 F.3d at 1149. Here, by contrast, the Board exercises unwavering adherence to the challenged 90% benchmark.

The TPM "reconsideration" process is further evidence that the Board blindly applies the 90% time-served policy. In truth, the hearing examiner who conducts this purely "paper" review exercises no discretion with respect to 90% cases. Unless an initial hearing examiner erroneously calculates the inmate's TPM date under the 90% time-served policy, when in fact the inmate's offense does not fall under that policy, hearing examiners will not re-submit recommendations to the Board even if the initial recommendations contain mathematical errors. He alone makes this decision, unilaterally ending the review process without any adversarial hearing or meaningful reconsideration.

b. The Board's Internal Policy Indicators

Likewise, the Board's December 9, 1997 resolution adopting the challenged policy, as well as the Board's related guidelines and policy statements, serve as circumstantial evidence that the 90% time-served policy is applied mandatorily. The pertinent text of the resolution provides:

> WHEREAS: Since 1991, the Board has steadily and consistently amended and refined its guidelines to provide for lengthier time-served for violent and dangerous criminals while reducing the overall number of individuals released on parole; and,
>
> WHEREAS: The Board believes that a further amendment to its statutorily mandated guidelines will further enhance public safety and make Georgia the toughest state in the nation for "time-served" for violent felonies and residential burglaries;
>
> THEREFORE: Be it now hereby resolved by the [Board] that its statutorily mandated guidelines are hereby amended to provide that any offender who is convicted on or after January 1, 1998, of one or more of [20 enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison.

(90% time-served policy at 1). This language clearly expresses the Board's intent to lengthen the actual time certain inmates serve in prison, "mak[ing] Georgia the toughest state in the nation" in this regard, and declares that, with respect to covered offenders, service of a minimum of 90% of the court- imposed term of incarceration "will be

required " (90% time-served policy at 1 (emphasis added)).[5]

The policy statement published on the Board's internet home page similarly declares that "[t]he Board requires all violent offenders ... to serve a minimum of 90 percent of their court-imposed terms of incarceration." State of Georgia Board of Pardons & Paroles, "90-Percent Policy," Parole Consideration and Eligibility (www.pap.state.ga.us/eligibility.html, visited on May 2, 2002) (emphasis added). Finally, the text accompanying the Guidelines Grid indicates:

> "Board's 90% Resolution: Pursuant to Board policy, for persons CONVICTED on or after January 1, 1998, the Guidelines recommendation will be 90% of the court-imposed prison sentence or the Grid recommendation, whichever is greater....

(Guidelines Grid). In each of these examples, no discretion is implied. Instead, the Board's language is unambiguously mandatory, further supporting plaintiff's contention that the Board's enforcement of the 90% time-served policy has the force and effect of law for ex post facto purposes.

c. Plaintiff's Parole Success Likelihood

Given this determination, the challenged action violates the Ex Post Facto Clause if there is a substantial likelihood that plaintiff would have been paroled earlier had the Board not retroactively enforced its 90% time-served policy against him. As noted, the Guidelines Grid rates the

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[5] Notably, in reviewing the parole procedures at issue in *Garner*, the Supreme Court declared: "Absent a demonstration to the contrary, we *presume* the Board follows its ... internal policies in fulfilling its obligations." 529 U.S. at 256 (emphasis added).

range within which plaintiff's 14-point Parole Success Likelihood Score falls as "excellent." Yet, both Masters and Sullivan opined that plaintiff would not likely have been paroled even if the 90% time-served policy did not apply to his offense. Masters and Sullivan explained that, in their opinion, the Superior Court sentenced plaintiff to an unusually light term of confinement, anticipating that the Board would require plaintiff to serve at least 90% of it. Thus, they argued, the Board would not likely have recommended an October 2001 TPM even without the 90% requirement.

The statistical evidence presented at the April 10th hearing nonetheless established that although plaintiff received a shorter than average prison term, his term (5 years) was shorter than average as compared to all non-life aggravated assault sentences imposed during 1998 (6.3 years), a year in which Superior Court judges would have been aware of the new 90% requirement (Def.'s Ex. 12). It is fair to infer, therefore, that the sentencing court imposed a shorter than average term not because of its awareness of the 90% requirement, but because it did not regard plaintiff's crime as particularly egregious as compared to other aggravated assaults. Further, the court notes that plaintiff's June 2003 TPM would require him to serve 54 months, or 4.5 years, a prison term that greatly exceeds the average time-served attributable to all aggravated assault offenders released from 1996 through 2001 (Pl.'s Ex. 6 at 3; Def.'s Ex. 12). The court cannot reconcile this fact with plaintiff's 34-month grid score and his parole success rating of "excellent" without concluding that plaintiff would likely have received an earlier TPM date but for the Board's retroactive application of the 90% time-served policy. Accordingly, plaintiff has made the requisite showing of unconstitutionality under the Ex Post Facto Clause.

IV. Prerequisites for Injunctive Relief

To prevail on a motion for injunctive relief, a plaintiff must establish the following four factors: (1) actual success on the merits; (2) a threat of irreparable injury; (3) that plaintiff's own injury would outweigh the injury to defendant; and (4) that an injunction would not disserve the public interest. See Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir.1999); Spottsville v. Barnes, 135 F.Supp.2d 1316, 1318 (N.D.Ga.2001) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). See also Siegel v. LePore, 234 F.3d 1163, 1213 (11th Cir.2000) (Carnes, J., dissenting). With respect to plaintiff's ex post facto claim, the court concludes that plaintiff's showing justifies the injunctive relief he seeks. Accordingly, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1].

IV. Conclusion

Having determined that the Board's retroactive enforcement of its 90% time- served policy against plaintiff is unconstitutional and invalid for the reasons set forth herein, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1]. Defendant State Board of Pardons & Paroles, its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with the State Board of Pardons & Paroles who receive actual notice of this order by personal service or otherwise, are hereby **RESTRAINED** and **ENJOINED** from taking any actions of any kind, legal or otherwise, to carry out, assert and/or enforce the 90% time-served policy as it relates to this individual--plaintiff Coleman Jackson. Defendant is hereby **ORDERED** to provide plaintiff with an initial parole eligibility hearing within **FORTY-FIVE (45) DAYS** of the issuance of this order. Further, defendant is hereby **ORDERED** to consider plaintiff's parole eligibility without regard to the 90% time-served policy. To the extent that plaintiff's counsel has moved for an order directing plaintiff's

immediate release from custody, said motion is hereby **DENIED**. Nevertheless, the court will reconsider plaintiff's request if defendant fails to comply with this order.

IT IS SO ORDERED, this 29th day of May, 2002.

s/ William C. O'Kelley
William C. O'Kelley
Senior United States District Judge